Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,
*Petitioners,*

*v.*

DR. IRIS I. VARNER, *et al.*,
*Respondents,*

AND

UNITED STATES OF AMERICA,
*Intervenor-Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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Dated: January 11, 1999

## QUESTIONS PRESENTED

1. Does the Equal Pay Act abrogate Eleventh Amendment immunity?

2. Does Congress have the power under Section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment immunity of the States absent a showing of either constitutional violations or exceptional circumstances?

## PARTIES TO THE PROCEEDING

The petitioners in this case are Illinois State University, Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, The Board Of Regents, and David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski, individually and in their capacities as members of The Board of Regents. The respondents are Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated.

## RULE 29.1 STATEMENT

Petitioner Illinois State University is governed by the Illinois State University Board of Trustees (formerly the Board of Regents), a body politic and corporate, which is a creation of statute and an arm of the State of Illinois. Petitioners Robert W. Jefferson, David Strand, John K. Urice, Thomas P. Wallace, David T. Murphy, Carol K. Burns, Joseph B. Ebbesen, Carl E. Kasten, Nancy J. Masterson, Patricia A. McKenzie, James W. Myles, Barbara Scheibling, Niranjan Shah and William Sulaski are individuals.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Illinois State University, *et al.* ("ISU") hereby petition this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the circuit court is reported at 150 F.3d 706 (7th Cir. 1998). *See* Appendix ("App.") at 2a. The two opinions of the district court are reported at 972 F. Supp. 458 (C.D. Ill. 1997) and 986 F. Supp. 1107 (C.D. Ill. 1996), respectively. *See id.* at 27a and 47a. The Magistrate's Report and Recommendation is not reported. *See id.* at 39a. The October 13, 1998 Order of the Court of Appeals denying ISU's request for rehearing and suggestion for rehearing *en banc* is also not reported. *See id.* at 1a.

## JURISDICTION

The ruling of the Court of Appeals was entered on July 21, 1998. *See* App. at 2a. On October 13, 1998, the Seventh Circuit denied ISU's request for rehearing and suggestion for rehearing *en banc*. *See id.* at 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

The forum selection clause of the Equal Pay Act, 29 U.S.C. § 206(d)(1), which is itself derived from the Fair Labor Standards Act, 29 U.S.C. §§ 201-216, provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). The Equal Pay Act and the relevant portions of the Fair Labor Standards Act are reprinted in their entirety in the Appendix.

## STATEMENT OF THE CASE

The proceedings in the district court and the circuit court are discussed below.

### A. Proceedings In The District Court

On their own behalf and on behalf of all other persons similarly situated, Plaintiffs Dr. Iris I. Varner, *et al.*

(collectively referred to herein as "Plaintiffs") filed this suit on March 13, 1995 against ISU and various of its officers and regents, alleging violations of the Equal Pay Act and seeking from ISU money damages as well as injunctive relief. On May 22, 1997, the district court certified a class that consists of all female faculty members at ISU from 1982 to the present.

Following this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), ISU moved on October 22, 1996 to dismiss Plaintiffs' Equal Pay Act claims on Eleventh Amendment grounds. On July 11, 1997, the United States Department of Justice ("DOJ") sought leave to intervene in the proceeding before the district court. On July 30, 1997 (after granting the DOJ's motion to intervene but before allowing ISU an opportunity to respond to the DOJ's submission), the district court denied ISU's motion to dismiss. *See* App. at 27a. On August 28, 1997, ISU filed a notice of appeal.

**B. Proceedings In The Circuit Court**

Oral argument was held by the circuit court on February 26, 1998, and on July 21, 1998, the circuit court issued its panel opinion. *See* App. at 2a. In affirming the district court, the Seventh Circuit began by reiterating the principals established by this Court in *Seminole Tribe—i.e.*, the States are immune from suit in federal court unless Congress (i) unequivocally expresses its intent to abrogate immunity in the text of the statute itself and then only if (ii) Congress has properly acted pursuant to its authority under Section 5 of the Fourteenth Amendment. *See id.* at 4a.

Although the circuit court acknowledged the principals of *Seminole Tribe*, it by no means adhered to them. In spite of this Court's requirement that evidence of intent to abrogate be found in the statute itself, the circuit court devoted much of its opinion to a discussion of the "context and history" of the Equal Pay Act, concluding that matters outside the statutory text were "helpful" in determining whether Congress intended to abrogate. *See* App. at 6a. To that end, the Seventh Circuit found that the 1974 Amendments to the Fair Labor Standards

Act (and by extension the Equal Pay Act) were intended as a "response" to this Court's decision in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 284-86 (1973).[1] Based on that interpretation of the events surrounding the passage of the 1974 amendments, the circuit court found evidence of intent to abrogate. *See id.* at 6a-8a.

The circuit court next looked at the statute itself. *See* App. at 8a. The circuit court, however, rested its entire textual analysis on the fact that the 1974 amendments to the Fair Labor Standards Act (i) defined "employees" to include both federal and state employees and (ii) allowed those individuals to file suit against their "employers" in "any Federal or State court of *competent jurisdiction.*" *See id.* (emphasis added). While the circuit court acknowledged in passing this Court's prior ruling that "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment," the circuit court nonetheless concluded under its own precedents that any further "degree of explicitness is not required," never considering how a federal court is a "court of competent jurisdiction" in those instances where a State is a party. *See id.* at 9a (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985)). The circuit court likewise acknowledged this Court's prior holding that even the creation of a cause of action against a State is insufficient evidence of intent to abrogate, but again, the circuit court took another path. *See id.* at 8a-9a (citing *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991)). Accordingly, the circuit court found that the first prong of the *Seminole Tribe* test was met.

The circuit court also found that the second prong of the *Seminole Tribe* test had been satisfied, ruling that Congress had the power under the Fourteenth Amendment to prohibit what

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[1] The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act. Both pieces of legislation share definitions and enforcement provisions. *See* 29 U.S.C. §§ 201-216.

amounts to constitutional state action. *See* App. at 10a-23a. More specifically, the circuit court rejected ISU's argument that because liability attaches under the Equal Pay Act without any showing of intentional discrimination, the Equal Pay Act proscribes constitutional state action and is, therefore, not proper "remedial" legislation under the Fourteenth Amendment. *See id.* at 19a-23a.

The circuit court began its analysis by noting that this Court had rejected in *Boerne* any notion that Congress has "substantive" legislative powers under the Fourteenth Amendment. *See* App. at 19a-20a (citing *City of Boerne v. Flores*, -- U.S. --, 117 S. Ct. 2157, 2163-64 (1997)). The circuit further acknowledged that ISU's reading of *Boerne* was not "without some appeal." *See id.* at 20a. The circuit court, however, had considerable difficulty distinguishing between "substantive" and "remedial" legislation, concluding that a lack of uniformity in the way the terms were applied had led to a disarray in the various courts of appeals:

> The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray.

*Id.* at 20a n.12.

In spite of the disarray, the circuit court ultimately ruled that since the Equal Pay Act was intended to remedy the "serious and endemic problem of employment discrimination in *private industry*," the statute is not "out of proportion to the harms that Congress sought to redress." *See* App. at 21a-22a (emphasis added). Accordingly, the circuit court attempted to meet the requirements of *Boerne* by relying on a congressional finding of discrimination in *private industry* in order to justify the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 21a. No further explanation was given by the circuit court as to why a finding about private industry should have any bearing at all on whether the States had violated the Fourteenth

Amendment, let alone serve as a basis for abrogation of Eleventh Amendment immunity.

In light of the foregoing, ISU filed with the circuit court a request for rehearing and a suggestion for rehearing *en banc*.[2] *See* App. at 1a. ISU's request for rehearing was denied by the circuit court without opinion on October 13, 1998. *See id.*

ISU now requests that this Court issue a writ of certiorari in order to review the decision of the circuit court.

## REASONS FOR GRANTING THE WRIT

In recent years, this Court has given clear directives to the circuit courts on the proper analysis of Eleventh Amendment immunity. By and large, those directives are not being followed. This is most certainly a case in point. Here, the circuit court acted in direct conflict with this Court's prior rulings on at least two different issues.

*First*, the circuit court's analysis of congressional intent to abrogate was based largely on an impermissible analysis of legislative history and statutory context. The only textual analysis performed by the circuit revealed no evidence of intent, and the circuit did not even consider the fact that Congress itself expressly limited suits under the Equal Pay Act to courts of "competent jurisdiction." In fact, the circuit court's reading of the Equal Pay Act was so cursory and illogical that it would have the unintended consequence of subjecting the federal government to suit in state court on *any* claim made under the Fair Labor Standards Act, a result that not even the circuit could

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2 While ISU's petition for rehearing was pending, the Eighth Circuit reached the opposite conclusion the Seventh Circuit had reached in this case. *Compare Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822 (8th Cir. 1998) *with* App. 2a-26a. The Eighth Circuit ruled in *Humenansky* that Congress had exceeded its Section 5 power in passing the Age Discrimination in Employment Act. *See Humenansky*, 152 F.3d at 828. The *Humenansky* decision was promptly brought to the attention of the Seventh Circuit. Hence, the "disarray" noted by the circuit court in its opinion in this case has only grown deeper since that opinion was issued.

believe was intended by Congress. Accordingly, the circuit court acted in a manner that is directly at odds with this Court's rulings in *Atascadero* and *Dellmuth*.

*Second*, the circuit court failed to follow this Court's rulings in *Boerne* and *Katzenbach*. The circuit court found that under the Fourteenth Amendment, Congress has the authority to abrogate the Eleventh Amendment immunity of the States based on nothing more than a finding of employment discrimination in *private industry*. That finding can, of course, not possibly serve as a basis under the Fourteenth Amendment for abrogating Eleventh Amendment immunity. Even worse, the circuit court never addressed the forum selection clause of the Equal Pay Act nor did it so much as consider how allowing States to be sued in federal court could conceivably meet the "congruence and proportionality" test of *Boerne*. Thus, the circuit court came to the opposite result required by *Boerne* and *Katzenbach*, and in so doing, it denied the State of Illinois the right to Eleventh Amendment immunity to which it is entitled under the Constitution.

We elaborate below.

## I. THE CIRCUIT COURT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE DISPOSITIVE ISSUE OF CONGRESSIONAL INTENT

As noted above (*see* disc. *supra* at 3), this Court established a two-prong test for abrogation in *Seminole Tribe*. *See Seminole Tribe*, 517 U.S. at 55. Under the first prong of that test, abrogation can be found if and only if Congress has expressed in the statute itself an "unmistakably clear" expression of intent to abrogate. *See id.* at 55-56. The circuit court, however, failed to find the required expression of intent. In so doing, the circuit court acted in a manner that is directly at odds with this Court's precedents, thereby denying ISU of its right to Eleventh Amendment immunity. Moreover, the circuit court set a precedent that will now allow the federal government to be sued in state court for any violation of the Fair Labor

Standards Act, thereby opening the floodgates for scores of suits to be brought against the United States in the courts of the States.

### A. Clear And Unambiguous Evidence Of Intent To Abrogate Must Be Found In The Statute Itself

This Court has repeatedly held that in order to abrogate Eleventh Amendment immunity, congressional intent must be "unmistakably clear in the language of the statute." *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Such evidence must be both "textual" and "unequivocal." *See id.* at 230; *see also Atascadero*, 473 U.S. at 243. If the text of the statute does not make it absolutely clear that Congress intended to abrogate, then the abrogation inquiry stops there. *See id.* Any ambiguity compels a finding of no abrogation. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *see also Kimel v. State of Florida Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998) (language supporting abrogation must be "clear as the summer sun").

Because evidence of intent must be found in the statute itself, recourse to materials outside the statute is neither necessary nor appropriate. *See, e.g., Dellmuth*, 491 U.S. at 230. As this Court has held on numerous occasions, analysis of legislative history plays no role whatsoever in the required analysis. *See, e.g., id.* Similarly, review of the statutory "structure" is of no relevance. *See, e.g., id.* If the statute itself does not reflect "clear" and "unambiguous" evidence of intent, then nothing in the legislative history or the structure of the statute is of any consequence. *See, e.g., id.*; *see also Nordic Village*, 503 U.S. at 37.

### B. The Only Textual Basis Identified By The Circuit Court Has Long Since Been Rejected By This Court As A Basis For Abrogation

The circuit court was able to identify little or no textual support for abrogation. *See* App. at 7a-9a. It was for that reason that the circuit court was forced to rely on the legislative history and the statutory structure of the Equal Pay Act. *See*

disc. *infra* at 15-16. Misplaced as it was, however, that reliance does not and cannot obscure the lack of any clear evidence of intent to abrogate in the Equal Pay Act itself.

Unlike a number of federal statutes that explicitly abrogate Eleventh Amendment immunity, the Equal Pay Act does not even mention the Eleventh Amendment, sovereign immunity or abrogation. *Compare* Equal Pay Act, 29 U.S.C. § 216(b), *with, e.g.*, Copyright Act, 17 U.S.C. § 511(a) *and* Age Discrimination in Employment Act, 42 U.S.C. § 12202; *see also, e.g., Kimel*, 139 F.3d at 1430-31 (giving weight to the fact that the Age Discrimination in Employment Act contains "no reference to the Eleventh Amendment or to states' sovereign immunity"). Quite to the contrary, the Equal Pay Act is entirely silent on the issue, placing it in sharp contrast to the statutes that contain the necessary expression of intent. *See, e.g.*, 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

Given the absence of any direct textual evidence of intent to abrogate, the circuit court relied instead upon language in the Equal Pay Act that "authorizes 'employees' to sue 'public agencies'" in any "Federal or State court of *competent jurisdiction.*" *See* App. at 8a (emphasis added). This clause was the sum total of the "evidence" found by the circuit for intent to abrogate. *See id.* Under this Court's precedents, however, that clause scarcely constitutes "unmistakably clear" evidence of intent.

**1. In Limiting Suits To Courts Of "Competent Jurisdiction," Congress Provided No Evidence Of Intent To Abrogate Eleventh Amendment Immunity**

On its face, the clause relied upon by the circuit court simply does not amount to an unambiguous expression of intent. Congress only authorized suit in courts of "competent jurisdiction." *See* 29 U.S.C. § 216(b). In light of the Eleventh

Amendment, however, a federal court is plainly not a court of "competent jurisdiction" for a suit brought against a State. *See United States v. Morton*, 467 U.S. 822, 828 (1984) (the term "competent jurisdiction" generally refers to subject matter jurisdiction); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (Eleventh Amendment is a jurisdictional limit on the federal courts); *Atascadero*, 473 U.S. at 243 (same).

Significantly, the circuit court did not consider the meaning of the phrase "competent jurisdiction." *See* App. at 6a-9a. That phrase, however, must be accounted for in any meaningful assessment of congressional intent. *See, e.g., Walters v. Metropolitan Educ. Enter., Inc.*, --U.S.--, 117 S. Ct. 600, 664 (1997) (statutes must be interpreted to give each word effect). By including the phrase "court of competent jurisdiction," Congress was by no means signaling an "unequivocal" intent to upset the general rule (as reflected in the Eleventh Amendment) that the States are not subject to suit in federal court. *See, e.g., Atascadero*, 473 U.S. at 242-43. If anything, Congress was doing just the opposite. *See, e.g., Kimel*, 139 F.3d at 1432 n.11 ("[A] federal court lacks 'competent jurisdiction' if the Eleventh Amendment prohibits the suits against the State."). The inclusion of the phrase in the statute is a fairly clear indication that the Eleventh Amendment was not being abrogated. *See, e.g., id.*; *see also, e.g., Employees*, 411 U.S. at 281. What else could it mean?

At most, the phrase "court of competent jurisdiction" makes the statute ambiguous as an indicator of congressional intent to abrogate. Under this Court's precedents, however, ambiguity compels the converse of the result reached by the circuit court. *See Atascadero*, 473 U.S. at 240 (abrogation only found when mandated "by the most express language or by [] overwhelming implication from the text"). If there is ambiguous evidence of intent to abrogate, then there is no abrogation. *See, e.g., Nordic Village*, 503 U.S. at 37 (congressional intent to abrogate must be "unambiguous").

That is the rule set down by this Court but ignored by the circuit court. *See, e.g., Atascadero*, 473 U.S. at 240.

### 2. The Statutory Language Relied Upon By The Circuit Court Is Nothing More Than A General Authorization For Suit Against The States

In truth, the statutory language relied upon by the circuit court amounts to nothing more than the creation by Congress of a right of action against the States. *See* 29 U.S.C. § 216(b); *see also Kimel*, 139 F.3d at 1432 n.11. This Court, however, has explicitly rejected the argument that the creation of a cause of action is adequate evidence of intent to abrogate. *See Hilton*, 502 U.S. at 206. In *Hilton*, the Court drew a clear distinction between (i) the creation of a cause of action against the States *and* (ii) the abrogation of the Eleventh Amendment immunity of the States. *See id.* at 205-06. The two inquiries are separate and distinct, and as reflected in *Hilton*, a cause of action can be created without any abrogation of Eleventh Amendment immunity.[3] *See id.*

There is obviously a fundamental difference between the issue of *where* a State may be sued and the issue of *whether* it may be sued. *See Hilton*, 502 U.S. at 205-06; *see also Welch*, 483 U.S. at 473. The circuit court, however, conflated the two.

ISU has never contested the fact that the Equal Pay Act creates a cause of action against the States. Rather, the issue here is whether in light of the Eleventh Amendment, such a claim may be brought in federal court.[4] Contrary to the

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[3] In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 476 (1987), this Court ruled that the Jones Act did *not* abrogate Eleventh Amendment immunity. The State of South Carolina then argued in *Hilton* that because there was no abrogation, there was necessarily no creation of a cause of action against the States. *See Hilton*, 502 U.S. at 203-04. This Court, however, rejected that argument, finding creation and abrogation to be separate and distinct. *Compare id.* at 206 *with* App. at 8a.

[4] It is now well settled that a state employee having a claim under the other provisions of the Fair Labor Standards Act must pursue that

(continued...)

conclusion reached by the circuit court, the fact that Congress created a cause of action against the States is in no way dispositive. *See Hilton*, 502 U.S. at 206. That is the clear holding of *Hilton*. *See id.*

By disregarding the foregoing precedents, the circuit court deprived ISU of its constitutional right to Eleventh Amendment immunity. Congress did create a cause of action against ISU in amending the Equal Pay Act in 1974. That cause of action, however, can and should be brought in the courts of the State of Illinois, in deference to the vital interests implicated by the Eleventh Amendment. *See, e.g., Welch*, 483 U.S. at 473 (a "State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued").

### C. The Circuit Court's Interpretation Of The Equal Pay Act Would Lead To Incongruous Results

The serious infirmities in the textual analysis performed by the circuit court are made all the more clear by the obvious consequences of its reading of the Equal Pay Act. Under that reading, Congress would not only have abrogated Eleventh Amendment immunity, but it would have also allowed claims against the *federal* government to be brought in *state* courts.[5]

The circuit court concluded that because the Equal Pay Act authorizes suits by "employees" against "public agencies" in "any Federal or State court of competent jurisdiction," there is "little difficulty" in finding that Congress intended to abrogate.

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(...continued)

claim in state court and not federal court. *See, e.g., Aaron v. Kansas*, 115 F.3d 813, 816-18 (10th Cir. 1997); *see also* App. at 10a n.5 (listing cases). Since it is also part of the Fair Labor Standards Act, why should the Equal Pay Act be any different? Moreover, there certainly is nothing extraordinary about Congress creating a cause of action against the States that is enforceable only in state court. *See, e.g., id.* Claims against the States under the Fair Labor Standards Act are pursued every day in state courts throughout the country, and no one is any worse for the wear. *See, e.g., Aaron*, at 817-18.

5 Relevant portions of the Fair Labor Standards Act are reprinted in the Appendix at 57a-60a.

*See* App. at 8a (emphasis omitted). The Equal Pay Act's definition of "employees," however, also includes employees of the federal government, and the statutory definition of "public agencies" likewise includes the federal government. *See* 29 U.S.C. § 203(e)(2)(A); 29 U.S.C. § 203(x). This is made very clear by the statute itself:

> "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x). Thus, the Equal Pay Act treats federal and state governments identically. It creates for employees of both a cause of action against their employer in "any Federal *or State court* of competent jurisdiction." *See* 29 U.S.C. § 216(b) (emphasis added).

If Congress really intended to abrogate Eleventh Amendment immunity in the Equal Pay Act, then it necessarily follows that Congress also intended to waive the federal government's immunity to suit in state court by providing that suits against the federal government may be brought in either "Federal or State court."[6] *See* 29 U.S.C. § 216(b). After all, the standard for abrogation of the federal government's

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[6] The full text of the forum selection clause in the Equal Pay Act is as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b). Given this language, it is obvious that the circuit court's reading of the Equal Pay Act necessarily means that the federal government can be sued in state court. *See id.*; *see also United States v. King*, 395 U.S. 1, 4 (1969) (identical standard for abrogation of state and federal immunity).

immunity is identical to the standard for abrogation of the Eleventh Amendment. *See King*, 395 U.S. at 3. There must be an "unequivocal" expression of intent to abrogate for both. *See, e.g., id.*

It could scarcely be suggested that the Equal Pay Act "plainly" eliminates the federal government's immunity to suit in state court.[7] Yet there is absolutely no more textual evidence that Congress intended to eliminate the Eleventh Amendment immunity of the States. On the circuit court's reading of the statute, both conclusions are as inescapable as they are illogical.

If not corrected, the holding of the circuit court would have widespread implications. The federal government would be amenable to suit in state court not only under the Equal Pay Act but also under the many other provisions of the Fair Labor Standards Act, including its wage and overtime provisions. *See* App. at 57a-60a. Hundreds of cases against the federal government that are now litigated in federal court will be able to be litigated in state court, with the incongruous result that the federal government will have to defend itself in the courts of another sovereign.

In reality, of course, the Equal Pay Act clearly does not contain "unequivocal textual" evidence that Congress intended to abrogate the immunity of *either* the States or the federal government. Quite the opposite, it merely creates a right of action against both federal and state governments, without suggesting any intent to eliminate the traditional defenses afforded sovereigns for suits brought in the courts of another sovereign. *See* 29 U.S.C. § 216(b); *see also Dellmuth*, 491 U.S. at 229-30; *Hilton*, 502 U.S. at 206. The reasoning relied upon by the circuit court simply cannot support a finding of

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[7] At oral argument before the circuit court, counsel for the United States (as intervenor) advanced the argument on intent that was ultimately accepted by the circuit court, but the United States was by no means willing to concede that the Equal Pay Act allows federal employees to sue the federal government in state court. No other result, however, can square with the circuit court's reading of the statute.

abrogation of either of Eleventh Amendment immunity or the sovereign immunity of the United States. *See, e.g., Dellmuth*, 491 U.S. at 230-32; *see also King*, 395 U.S. at 4.

Interpretations of statutes that lead to illogical or absurd results are to be avoided. *See, e.g., Clinton v. City of New York*, -- U.S. --, 118 S. Ct. 2091, 2098 (1998). The circuit court, however, provided nothing more.

### D. By Relying Upon Matters Outside The Text Of The Statute, The Circuit Court's Decision Conflicts With This Court's Prior Precedents

The circuit court was able to find no dispositive textual support for abrogation. *See* App. at 6a-9a. It was for that reason that it devoted so much of its opinion to a discussion of the legislative history and structure of the Equal Pay Act. *See id.* at 6a-8a.

Indeed, the circuit court made no bones about the nature of its inquiry. In the very first sentence of its discussion of congressional intent, the circuit court made the following statement:

> In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, *it is helpful to consider the context and history of the statute*.

App. at 6a (emphasis added). The circuit court then proceeded to identify the 1974 amendments to the Fair Labor Standards Act (and by incorporation the Equal Pay Act) as a "response" to this Court's decision in *Employees*. *See id.* at 7a (citing *Employees*, 411 U.S. at 284-86).

The circuit court's conclusion can, of course, only be derived from a review of materials outside the statute, and by the Seventh Circuit's own admission, that analysis played a pivotal role in its conclusion that Congress intended the 1974

Amendments to abrogate Eleventh Amendment immunity.[8] *See* App. at 6a-7a.

As such, the opinion of the circuit court rests on an impermissible basis and is at odds with the precedents of this Court. By this Court's clear directives, the circuit court's analysis of context and history has no role whatsoever in a proper analysis. *See, e.g., Dellmuth*, 491 U.S. at 230; *see also Nordic Village*, 503 U.S. at 1016. The circuit court was only compelled to look at the legislative history and context because the required textual support was lacking. *See* App. at 6a-9a; *see also Dellmuth*, 491 U.S. at 230 (if it is necessary to resort to legislative history, then by definition the text of the statute is insufficiently clear to support abrogation).

### E. The Circuit Court's Failure To Follow This Court's Precedents Plainly Warrants The Granting Of Certiorari

The failure of a court of appeals to follow the precedents of this Court is a well recognized basis for granting certiorari. *See, e.g.*, SUP. CT. R. 10(1)(c); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982). That is all the more true where the issue involved is the Eleventh Amendment and where the upshot of failing to follow precedents is the denial of a State's Eleventh Amendment immunity. *See, e.g., Dellmuth*, 491 U.S. at 227-28 ("[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States . . . .").

As this Court has so often recognized, the Eleventh Amendment is of critical importance to our federalism. *See*,

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[8] Later in its opinion, the circuit court did suggest in a footnote that its lengthy analysis of legislative history played no role in its assessment of intent. *See* App. at 7a n4. That disclaimer, however, is directly at odds with the circuit court's earlier acknowledgment that "it is helpful to consider the context and history of the statute." *See id.* at 6a. In addition, it is at odds with common sense. If the circuit court viewed legislative history and context as irrelevant, then why did it devote the better part of its discussion of intent to those matters?

*e.g.*, *Atascadero*, 473 U.S. at 242. It is a "fundamental" rule of jurisprudence that plays a "vital role" in the federal system. *See id.* It does no less than establish the "constitutional balance between the Federal Government and the States." *See id.* Moreover, it is a limitation on the federal judicial power conferred by Article III of the Constitution. *See*, *e.g.*, *Pennhurst*, 465 U.S. at 98.

Considering the importance of the interests that are implicated, the failure of a circuit court to follow the precedents of this Court in addressing Eleventh Amendment immunity should not be allowed to go unchecked. The State of Illinois is entitled to a full consideration of the issue of immunity in a manner consistent with the law established by this Court. That has yet to occur, and only this Court can rectify the problem.

## II. IN CONCLUDING THAT THE FOURTEENTH AMENDMENT IS A PLENARY SOURCE OF POWER FOR REGULATING CONSTITUTIONAL STATE ACTION, THE CIRCUIT COURT FUNDAMENTALLY MISAPPLIED *BOERNE* AND *KATZENBACH*

In the wake of *Seminole Tribe* and then *Boerne*, a number of courts have been asked to address the power of Congress to abrogate Eleventh Amendment immunity under the Fourteenth Amendment. As the circuit court noted in this case, however, the decisions rendered have led to a "disarray" among the circuits. That characterization by the circuit court is actually somewhat charitable.

Particularly in the area of employment law, the circuit courts as well as the district courts have had a very difficult time applying *Seminole Tribe* and *Boerne*. The result has been that there is little consistency in the results of their analyses or in the rationales utilized. Further guidance from this Court is most certainly called for, especially since it involves a matter of considerable importance.

The proper resolution of this issue often dictates (as it did here) whether or not a State will be subject to suit in federal court. On a matter as significant as the Eleventh Amendment,

the disarray noted by the circuit court cannot be allowed to persist. The determination of whether a State is subject to suit in federal court obviously should not depend on the fortuity of what circuit that State happens to be in.

### A. The Standard Set By This Court In *Katzenbach* And *Boerne*

The Fourteenth Amendment prohibits state action that "den[ies] to any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment is largely self-executing, Section 5 of the Fourteenth Amendment does grant Congress the "remedial" power to pass legislation to "enforce" the provisions of the Amendment. *See* U.S. CONST. amend. XIV, § 5; *see also Boerne*, 117 S. Ct. at 2164-67.

In *Boerne*, this Court addressed the limits of Congress' power to regulate state action under Section 5, ruling that the legislative authority of Congress is strictly limited to legislation that is "remedial" in effect. *See Boerne*, 117 S. Ct. at 2164-67. Conversely, this Court rejected any suggestion that the Fourteenth Amendment gives Congress the power to enact substantive legislation. *See id.*

As recognized in *Boerne*, the authority of Congress to pass legislation under the Fourteenth Amendment is limited to enforcing and punishing actual constitutional violations, as those violations are themselves defined by the federal courts. *See Boerne*, 117 S. Ct. at 2164. If such a limitation were not imposed, Congress would no longer be enforcing the Fourteenth Amendment but would instead be defining for itself what does and does not amount to a constitutional violation. *See id.* at 2164, 2168.

This Court's decision in *Boerne* was, of course, an outgrowth of its earlier decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Katzenbach*, this Court held that the Voting Rights Act was appropriate legislation under the provisions of the Fifteenth Amendment, notwithstanding the fact that some of its provisions prohibited

what was otherwise constitutional state action. *See Boerne*, 117 S. Ct. at 2163, 2166-68. Although the Court in *Katzenbach* upheld bans on practices that were not unconstitutional on their face (*e.g.*, literacy tests), it did so only after satisfying itself that extensive congressional findings demonstrated these practices were in fact applied discriminatorily and intentionally so as to prevent the enjoyment of the basic right to vote secured by the Fifteenth Amendment. *See Katzenbach*, 383 U.S. at 333-35.

In particular, the Court found that in enacting the Voting Rights Act, Congress was faced with "extraordinary" circumstances, including "nearly a century of systematic resistance" to basic constitutional guarantees. *See Katzenbach*, 383 U.S. at 328, 335 ("exceptional conditions can justify legislative measures not otherwise appropriate"). In *Katzenbach*, this Court expressly based its decision on the extraordinary conditions that then prevailed in certain areas of the South. *See id.* at 308-13. The Court recognized those conditions as,

> an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.

*Id.* at 309. It was, therefore, those "exceptional conditions" that warranted the exception to the general rule (*i.e.*, that Congress generally has no authority under the Fourteenth or Fifteenth Amendments to regulate constitutional state action).[9]

*Boerne* reaffirmed that the "exceptional conditions" that warranted the outcome in *Katzenbach* are truly exceptional and will only occur in the rarest of cases. *See Boerne*, 117 S. Ct. at 2169-70. The regulation of constitutional state action under the

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[9] Although *Katzenbach* involved the Fifteenth Amendment rather than the Fourteenth Amendment, this Court recognized in *Boerne* that *Katzenbach* is the most authoritative pronouncement on the scope of Congress' legislative authority under the enforcement clauses contained in the Civil War Amendments. *See Boerne*, 117 S. Ct. at 2166-67, 2169-70.

Fourteenth Amendment will only be tolerated when the legislation in question is "adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." *See id.* at 2170. Moreover, any attempt to regulate constitutional state action under the guise of the Fourteenth Amendment must necessarily meet the test of "congruence and proportionality," such that the means adopted are carefully tailored to address the specific injury that is to be prevented. *See id.* at 2164. Any legislation that does not meet these standards is properly considered "substantive" and outside the permissible scope of the Fourteenth Amendment. *See id.*

As demonstrated below (*see* disc. *infra* at 21-23), the Equal Pay Act does not begin to satisfy the requirements of *Katzenbach* and *Boerne*, and in reaching a contrary conclusion, the circuit court acted in a manner directly in conflict with this Court's rulings.

**B. The Equal Pay Act Prohibits Constitutional State Action**

Under the standards set by this Court, there can be no doubt that the Equal Pay Act is not valid legislation under the Fourteenth Amendment. As an initial matter, there is no dispute that the Equal Pay Act prohibits constitutional state action. *See* App. at 19a. The circuit court has itself repeatedly held that the Equal Pay Act "creates a type of strict liability in that no intent to discriminate need be shown." *See, e.g., Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (quoting *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985)). Under the Equal Pay Act, any difference in employment outcomes between women and men establishes a *prima facie* violation. *See id.* Liability may thus be imposed without any showing whatsoever of intentional discrimination. *See, e.g., id.* Moreover, under this strict liability regime, punitive damages may be assessed unless the defendant can affirmatively demonstrate its own good faith. *See, e.g., Joiner v. City of Macon*, 814 F.2d 1537, 1538-39 (11th Cir. 1987) (an employer who violates the Equal Pay Act is liable for liquidated

damages unless it can prove that its violation was in good faith and based upon reasonable grounds).

In sharp relief to the terms of the Equal Pay Act, this Court has consistently held that intent is a touchstone of any form of unconstitutional discrimination.[10] *See Washington*, 426 U.S. at 244-45. Only "*purposeful* [gender] discrimination . . . offends the Constitution." *See Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (emphasis added). Stated otherwise, the Constitution is only violated when a decision maker "select[s] or reaffirm[s] a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *See id.* at 279. The Constitution, therefore, requires purposeful discrimination, whereas the Equal Pay Act plainly does not. As such, the Equal Pay Act clearly proscribes conduct that is not unconstitutional.

**C. The Circuit Court Failed To Apply The *Boerne* Test**

In its opinion below, the circuit court itself admitted that the Equal Pay Act "proscribes some constitutional conduct." *See* App. at 21a. Under *Boerne*, however, that necessarily means that the Equal Pay Act could only be justified if it was a tailored response to address a specific constitutional violation by the States themselves. *See Boerne*, 117 S. Ct. at 2164, 2168. Evidence of general societal discrimination would not begin to meet the standard set in *Boerne*. *See id.* at 2168-69; *see* disc. *infra* at 27-28.

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[10] By its very terms, the Equal Pay Act allows a finding of discrimination based solely on disparate impact. *See* 29 U.S.C. § 206(d)(1). More than twenty years ago, however, this Court explicitly rejected the notion that disparate impacts violate the Fourteenth Amendment absent evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 245-48 (1976); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977). In this important respect, the Equal Pay Act is strikingly similar to the Religious Freedom Restoration Act (the statute invalidated in *Boerne*) -- Congress seeks to justify under its Fourteenth Amendment authority legislation that directly contradicts this Court's governing precedent regarding the scope of the Fourteenth Amendment. *See Boerne*, 117 S. Ct. at 2160-61.

The circuit court found no evidence whatsoever that in passing the 1974 Amendments to the Fair Labor Standards Act, Congress identified any instances of violations of constitutional rights by the States. *See* App. at 20a-22a. Instead, the goal of Congress in adding the amendments was (as recognized by the circuit court) simply to apply the minimum wage and overtime provisions of the Fair Labor Standards Act to state employees, which provisions ironically can only be enforced against the States in state court. *See id.* at 15a; *see also Aaron*, 115 F.3d at 816-18. In fact, the Seventh Circuit found only one reference to the Equal Pay Act in the Senate Committee's report, and that reference was in the discussion of the statute's historical background. *See* App. at 15a.

Unable to find any evidence of constitutional violations by the States, the circuit court instead found that Congress enacted the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of employment *discrimination in private industry*." *See* App. at 21a (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)) (emphasis added). This finding by the circuit court is really quite extraordinary, as it could not possibly justify the regulation of behavior by the States. *See* U.S. CONST. amend. XIV (prohibiting certain kinds of *state action*); *see also Boerne*, 117 S. Ct. at 2169-70 (relying entirely on the lack of discrimination by the States themselves in determining that the Religious Freedom Restoration Act was improper substantive legislation).

Evidence of discrimination in private industry is simply irrelevant to the Fourteenth Amendment, and it is certainly not a proper justification for prohibiting otherwise constitutional behavior by the States. *See Boerne*, 117 S. Ct. at 2168-69 (relying entirely on state action). When legislation cannot be justified by the slightest evidence of unconstitutional behavior by the States, it is extremely difficult to understand how such legislation could be considered a "proportional and congruent"

remedy designed to prevent identified constitutional violations.[11]

Before being deprived of its right to Eleventh Amendment immunity, the State of Illinois is entitled to a proper determination of whether Congress made any finding that the States themselves have violated the constitutional rights of their citizens. No evidence was offered (nor is there any) that the State of Illinois has intentionally engaged in gender discrimination. The conclusion by the circuit court that a finding of discrimination in *private industry* would suffice is, therefore, palpably insufficient. If *Katzenbach* and *Boerne* are to mean anything, the circuit court's analysis cannot be allowed to stand.

### D. The Circuit Court Failed To Address The Specific Statutory Provision At Issue Here

For the reasons set forth above (*see* disc. *supra* at 21-23), the Equal Pay Act as a whole does not and cannot meet the test articulated by this Court in *Boerne*. That conclusion is all the more inescapable, however, when one considers the specific provision of the Equal Pay Act that is at issue in this matter, namely the forum selection clause. Tellingly, the circuit court did not even bother to apply the *Boerne* test to that provision, choosing to instead speak of the statute in generic terms. *See* App. at 20a-22a.

The provision of the Equal Pay Act that the circuit court found to abrogate Eleventh Amendment immunity was, of course, the forum selection clause. *See* App. at 8a. The forum selection clause of the Equal Pay Act, however, is in no way,

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[11] Any notion that Congress has the power to pass Fourteenth Amendment legislation merely because it is "consistent" with "Fourteenth Amendment values" can only be sustained if one assumes "that Congress can define rights wholly independent of [the Supreme Court's] case law." *See Humenansky*, 152 F.3d at 826-27 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 262-263 (1983) (Burger, C.J., dissenting)). Such a finding, however, would "fundamentally alter[] our scheme of government." *See id.*; *see also Boerne*, 117 S. Ct. at 2168.

shape or form a "proportional or congruent" response to any identified harm. In fact, the circuit court did not even examine under *Boerne*'s "congruence and proportionality" test the very provision of the Equal Pay Act that it found requires the States to defend themselves in federal court. *See id.* at 20a-22a. Nowhere in its opinion does the circuit court address whether the Equal Pay Act's forum selection clause could possibly be justified under *Boerne*'s ends-and-means calculus.[12] *See id. But see Katzenbach*, 383 U.S. at 315-37 (examining each provision of the Voting Rights Act individually). The circuit court's opinion is just silent on the issue. *See* App. at 20a-22a.

Had the circuit court considered whether the forum selection clause is a remedy "proportional" to the harm it purports to correct, it is incontestable that that provision would have failed the test. *See Boerne*, 117 S. Ct. at 2164 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). The only effect of abrogation is to require the States to defend themselves in federal court rather than state court. But neither the Seventh Circuit nor any of the circuit courts that have addressed statutes in the wake of *Boerne* have suggested that a federal forum is necessary (or even desirable) to prevent or remedy any injury.[13]

There is, to the contrary, every reason to believe that state courts are fully capable of resolving the types of claims at issue

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[12] Obviously, each of the Equal Pay Act's provisions must be considered under *Boerne*'s "congruence and proportionality" test. After all, the Fourteenth Amendment is the source of authority for each provision. In *Katzenbach*, for instance, this Court carefully examined each contested provision of the Voting Rights Act. *See Katzenbach*, 383 U.S. at 315-37. Rather than granting a blanket endorsement of the entire statutory scheme proposed by Congress, each provision was considered individually by this Court to ensure that each provision was a properly circumscribed tool for the limited purpose of preventing violations of the Fourteenth Amendment. *See id.* The same is required here.

[13] Plaintiffs have likewise never suggested (nor could they) that a state forum would be in any way hostile to their claims.

in this case. Like Illinois, virtually every State has strong anti-discrimination laws of their own.[14] For example, the Constitution of the State of Illinois affirmatively prohibits discrimination on the basis of gender by state and local governments. *See* App. at 61a.[15] Moreover, the Illinois Human Rights Act outlaws employment discrimination and sexual harassment by any employer, including the State and its instrumentalities. *See id.* at 62a-79a. Given these provisions, no one could seriously claim that the courts of the State of Illinois are in any way hostile or unsympathetic to the sorts of claims being made by Plaintiffs in this case. *See id. at* 61a-79a.[16] In fact, it is undisputed that state courts would provide Plaintiffs with a full and fair opportunity to be heard. *See id.*

The complete absence of any suggestion (let alone evidence) that Illinois state courts are not a suitable forum for Plaintiffs' claims calls into serious question the circuit court's conclusion that the Equal Pay Act is itself a "congruent and proportional" remedy to a legitimate Fourteenth Amendment injury. *See* App. at 17a-22a. Since the only effect of the circuit court's determination is the abrogation of Eleventh Amendment immunity, it surely cannot be said that consideration of the need for a federal forum is irrelevant in determining whether the statute is "congruent and proportional" to its ends. That question, left entirely open by the circuit court's opinion, is deserving of an answer, especially given the importance of the

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[14] Forty-one States (including Illinois) have their own civil rights acts and/or equal pay acts. *See, e.g.*, 775 ILCS 5/1-101, *et seq.*, App. at 62a-79a; W. Va. Code Sec. 5-11-9; La. Rev. Stat. Ann. Sec. 301-334; Iowa Code Sec. 216.1-216.20; Utah Code Ann. Sec. 34A-5-106.

[15] Relevant portions of the Constitution of the State of Illinois and the Illinois Human Rights Act are reprinted in the Appendix at 61a-79a.

[16] Indeed, this Court has oft recognized that state courts and their judges are the equal of their federal counterparts. *See, e.g., Atascadero*, 473 U.S. at 238 n.2 ("It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.").

Eleventh Amendment. That answer, however, must come from this Court.

### E. The Disarray In The Circuits Is An Independent Reason For Granting Certiorari

As the circuit court acknowledged, the uncertainty over the proper application of this Court's decision in *Boerne* has led to "disarray" in the courts of appeals. *See* App. at 20a n.12. The decisions fall into two groups.

#### 1. The Conflicting Decisions

One group of decisions has interpreted *Boerne* to only require a general finding *of societal discrimination* in order to pass muster as "remedial" legislation under the Fourteenth Amendment. *See* App. at 21a (Equal Pay Act passed "to remedy what was perceived to be a *serious and endemic problem of employment discrimination in private industry*.") (emphasis added); *see also Coger v. Board of Regents of the State of Tennessee*, 154 F.3d 296, 305-07 (6th Cir. 1998); *Kimel*, 139 F.3d at 1437-44 (Hatchett, C.J., concurring in part and dissenting in part); *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998); *Coolbaugh v. Louisiana*, 136 F.3d 430, 436 (5th Cir. 1998); *Humenansky*, 152 F.3d at 830 (Bataillon, J., dissenting). According to these decisions, once *discrimination* is documented (be it private or public), Congress has wide latitude to fashion remedies that address the problem of societal discrimination. *See Kimel*, 139 F.3d at 1439. Those remedies may then be applied against the States pursuant to the Fourteenth Amendment power, unless they are somehow "disproportionate" to the general societal discrimination that they are designed to address. *See, e.g.*, App. at 22a (finding that the Equal Pay Act's "statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination" and are clearly related to "the letter and spirit of the Fourteenth Amendment"). It is significant, however, that none of these cases address (much less explain) why the

abrogation remedy is necessary or proportional to the generalized finding of discrimination. *See, e.g., id.* at 17a-22a.

A second group of decisions has interpreted *Boerne* more strictly. *See Humenansky*, 152 F.3d at 825-28; *Kimel*, 139 F.3d at 1445-1449 (Cox, J., concurring in part and dissenting in part); *Coolbaugh*, 136 F.3d at 440 (Smith, J., dissenting). Under these decisions, a statute is deemed to be "remedial" legislation only if two conditions are met. First, Congress must identify a documented pattern of constitutional violations by the States that would justify prohibiting constitutional state action. *See Boerne*, 117 S. Ct. at 2166-69; *see also Humenansky*, 152 F.3d at 827 (ruling that isolated instances of discrimination would not justify application of Section 5 power to prohibit constitutional state action); *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part) (the Americans with Disabilities Act is not valid enforcement legislation because it "was unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic remedies"). Second, the legislation must be a "congruent and proportional" response to the specific *constitutional violations identified. See Boerne*, 117 S. Ct. at 2164, 2169 ("the appropriateness of remedial measures must be considered in light of the evil presented"); *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part).[17]

As the latter cases recognize, the starting point for justifying any legislation that prohibits constitutional state action must be

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[17] The "disarray" noted by the Seventh Circuit is not limited to the circuit courts. *Compare Larry v. Board of Trustees of the Univ. of Alabama*, 975 F. Supp. 1447, 1449-50 (N.D. Ala. 1997) (holding that the Equal Pay Act is impermissible substantive legislation because it does not require a showing of intent as required by this Court's decision in *Washington v. Davis*) *with Belch v. Board of Regents of the Univ. Sys. of Georgia*, No. 3:94-CV-129(DF), 1998 WL 824497, *7-9 (M.D. Ga. Nov. 20, 1998) (holding that the Equal Pay Act is appropriate remedial legislation).

evidence of a pattern of actual *constitutional violations* by the States. *See, e.g., Humenansky*, 152 F.3d at 827; *Kimel*, 139 F.3d at 1449 (Cox., J., concurring in part and dissenting in part). Private acts of discrimination do not implicate the Fourteenth Amendment, and as a result, generalized findings of societal discrimination are irrelevant to the Fourteenth Amendment inquiry. *See* U.S. CONST. amend. XIV (proscribing certain types of *state action*). They are certainly insufficient evidence for allowing Congress to legislate beyond the terms of the Fourteenth Amendment and in derogation of the Eleventh Amendment. *See id.* Furthermore, *Boerne* requires that any *remedy* must be carefully tailored to address identified constitutional violations. *See Boerne*, 117 S. Ct. at 2169; *Kimel*, 139 F.3d at 1446. A remedy cannot, therefore, be applied to the States as a by-product of statutes primarily designed to address private discrimination. *See Boerne*, 117 S. Ct. at 2164, 2168; *see also Kimel*, 139 F.3d at 1446 (Cox, J., concurring in part and dissenting in part); *see also Coolbaugh*, 136 F.3d at 430, 440 (Smith, J., dissenting). Yet that is exactly what happened here.

**2. The Disarray In The Circuits Needs To Be Resolved**

The State of Illinois respectfully submits that the narrower interpretation of Congress' power under Section 5 (as reflected in the second group of decisions) is the only appropriate reading of this Court's previous rulings. As discussed above (*see* disc. *supra* at 18-20), the Voting Rights Act was and is the only statute prohibiting constitutional state action that the Supreme Court has ever approved in this century as an exercise of Fourteenth and Fifteenth Amendment authority. *See Boerne*, 117 S. Ct. at 2163. In that instance, this Court was driven by "exceptional" circumstances and the "extraordinary" need arising from the organized resistance *by the States themselves* to the extension of the right to vote. *See Katzenbach*, 383 U.S. at *passim*. Similarly, the remedies then at issue were tailored to

the specific constitutional violations by the States. *See*, *e.g.*, *id.* at 333-35.

Nothing in *Katzenbach* or its progeny, however, suggests or implies that prohibition of otherwise constitutional state conduct could be justified merely by demonstrating the widespread existence of private racial discrimination. Indeed, *Katzenbach* suggests just the opposite. *See Katzenbach*, 383 U.S. at 328-34 (holding there must be evidence of intentional action by the States that is designed to deprive citizens of their constitutional rights).[18]

Whatever the ultimate resolution of this issue is, the disarray in the lower courts must be addressed. The number of fractured and conflicting opinions continues to grow, affecting the basic constitutional rights of the States in hundreds of different lawsuits involving a spectrum of employment statutes. This Court has repeatedly recognized that the proper application of the Eleventh Amendment preserves the fundamental constitutional balance in our federal system. *See Atascadero*, 473 U.S. at 242. No question could be more important than resolving the confusion on this issue that currently reigns in the lower courts. *See*, *e.g.*, *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 n.9 (1981) (granting certiorari when there is disagreement among the lower courts on an important issue of constitutional interpretation).

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[18] Application of the *Boerne* proportionality standard is, of course, also informed by the constitutional presumption against abrogation. As this Court stated in *Seminole Tribe*, the Eleventh Amendment embodies the presumption "that each State is a sovereign entity . . . [and] it is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent." *See Seminole Tribe*, 517 U.S. at 54; *see also Atascadero*, 473 U.S. at 243 (the Eleventh Amendment is a jurisdictional limitation). This presumption is just as applicable to *Boerne*'s proportionality inquiry as it is to the statutory construction inquiry in *Dellmuth* and *Atascadero*.

## CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

(2) 981117 JAN 11 1999

No. _____ OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,

*Petitioners,*

*v.*

DR. IRIS I. VARNER, *et al.*,

*Respondents,*

AND

UNITED STATES OF AMERICA,

*Intervenor-Respondent,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Dated: January 11, 1999

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# UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 13 , 1998

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

DR. IRIS I. VARNER, *et al.*,
*Plaintiffs-Appellees,*

No. 97-3253 *v.*

ILLINOIS STATE UNIVERSITY, *et al.*,
*Defendants-Appellants.*

Appeal from the United States District, Court for the Central District of Illinois.

No. 95 C 1355
Michael J. Mihm
Judge.

**ORDER**

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled case on September 4, 1998, by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

No. 97-3253

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IN THE
**UNITED STATES COURT OF APPEALS**
FOR THE SEVENTH CIRCUIT

---

IRIS I. VARNER, *et al.*,
*Plaintiffs-Appellees,*

and

UNITED STATES OF AMERICA,
*Intervenor-Appellee,*

*v.*

ILLINOIS STATE UNIVERSITY, *et al.*,
*Defendants-Appellants.*

---

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1355—**Michael M. Mihm**, *Judge.*

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ARGUED FEBRUARY 26, 1998
DECIDED JULY 21, 1998

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Before BAUER, HARLINGTON WOOD, JR., and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* This appeal concerns the confluence of two recent, significant Supreme Court decisions, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The plaintiffs represent a class comprised of all tenured or tenure-track female faculty at Illinois State University ("ISU") from the 1982-83 academic year to the present. In 1995, they filed a complaint against ISU, four of its officials, its Board of Regents, and ten members of the Board (collectively,

"the University"). The plaintiffs alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e, and sought injunctive and monetary relief, including compensatory damages for intentional violations of Title VII under 42 U.S.C. § 1981a. The University, which is concededly a state entity, moved to dismiss the Equal Pay Act claim, as well as that part of the Title VII claim seeking compensatory damages. The University argued that its Eleventh Amendment immunity served as a bar to federal jurisdiction with respect to these claims. The district court denied the University's motion to dismiss. *See* 972 F. Supp. 458 (C.D. Ill. 1997), and 986 F. Supp. 1107 (C.D. Ill. 1996).

The University appealed the district court's denial of its Eleventh Amendment immunity defense. We granted the United States' motion to intervene to defend the constitutionality of this application of federal law to the States. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291 under the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). We affirm the district court's decision in all respects.

## I.

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. While the amendment by its terms appears to limit only the federal courts' Article III diversity jurisdiction, the Supreme Court has long "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779

(1991). The text of the amendment, narrowly written to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *see Seminole Tribe*, 517 U.S. at 67-70, stands for the larger proposition, inherent in our federal system, that each state remains a sovereign entity. *See id.* at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' ") (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Accordingly, the States enjoy an immunity from suit in federal court by all private parties for all causes of action, including suits arising under federal statutes. *See, e.g., Doe v. University of Ill.*, 138 F.3d 653, 656-57 (7th Cir. 1998). State sovereign immunity, however, is not absolute: A state may consent to suit in federal court[1] and, under certain circumstances, Congress may abrogate a state's Eleventh Amendment immunity.

Congress may constitutionally abrogate the States' Eleventh Amendment immunity under a particular statute if it both unequivocally expresses its intent to do so and acts pursuant to a valid exercise of power. *See Seminole Tribe*, 517 U.S. at 55. With respect to the latter inquiry, *Seminole Tribe* rejected the notion that the Indian Commerce Clause, U.S CONST. art. I, § 8, cl. 3, confers upon Congress the power to abrogate the States' Eleventh Amendment immunity. *See id.* at 71-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). In so holding, the Court also explicitly overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality of the Court held that the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, gave Congress the power to abrogate state sovereign immunity. *See* 517 U.S. at 63-66.

[1] No party contends that Illinois has consented to suit in the instant case.

The Court in *Seminole Tribe* reaffirmed, however, that valid legislation pursuant to § 5 of the Fourteenth Amendment could serve as a basis for abrogating state sovereign immunity.[2] *See id.* at 59-60, 63-66 (discussing *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976)) ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."). Thus, "[e]ven after *Seminole Tribe*, 'the Eleventh Amendment does not insulate the states from suits in federal courts to enforce federal statutes enacted under the authority of the Fourteenth Amendment.' " *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998) (quoting *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997)).

The University raises a number of arguments contending that Congress did not validly abrogate the States' Eleventh Amendment immunity when it passed the Equal Pay Act. First, the University asserts that the Equal Pay Act does not contain a clear and unequivocal expression of Congress's intent to abrogate the States' immunity. Second, the University posits that Congress passed the Equal Pay Act pursuant to its power under the Commerce Clause and not pursuant to its power under § 5. The University argues that, following *Seminole Tribe*, Commerce Clause legislation cannot validly abrogate the States' immunity from suit in federal court. Third, the University asserts that the Equal Pay Act does not

[2] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This section enables Congress "to enforce" the Fourteenth Amendment's guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law" or deny any person "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

constitute valid legislation under Congress's § 5 power in any event. In this context, the University relies on the Supreme Court's interpretation of § 5 in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), in conjunction with the fact that the Equal Pay Act does not require proof of intentional discrimination to support a valid claim for relief. The University's Title VII argument is more narrow. It concedes that Title VII itself contains a clear statement of legislative intent to abrogate the States' immunity. *See Fitzpatrick*, 427 U.S. at 456. However, the University argues that 42 U.S.C. § 1981a, which made available a compensatory damages remedy to Title VII plaintiffs, is a distinct statute from Title VII that does not contain its own statement of congressional intent to abrogate the States' Eleventh Amendment immunity. We address these arguments in turn.

## II. The Equal Pay Act

### A. Intent to Abrogate

In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, it is helpful to consider the context and history of the statute. Congress passed the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)), as an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 to § 219. The Equal Pay Act, which prohibits wage disparities on the basis of sex,[3] therefore employs the same definitional and enforcement provisions as do the

[3] The Equal Pay Act provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures

overtime and minimum wage provisions of the FLSA. *See* 29 U.S.C. §§ 203, 206-07, 216; *see also Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n.6 (6th Cir. 1997). In 1966, Congress amended the FLSA's definition of "employer" to include state government workers employed in hospitals, institutions, or schools. *See* Pub. L. No. 89-601 § 102(b), 80 Stat. 831 (amending 29 U.S.C. § 203(d)). The Supreme Court subsequently held, however, that the 1966 amendment to the FLSA did not abrogate the States' immunity from suit in federal court. *See Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284-86 (1973). As we have noted, *see Mueller v. Thompson*, 133 F.3d 1063, 1065 (7th Cir. 1998), Congress responded to *Employees* by amending certain provisions of the FLSA in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, including its definitions of "employer," 29 U.S.C. § 203(d) & (x), and "employee," *id.* § 203(e)(2)(c), as well as its enforcement provision, *id.* § 216(b).[4]

Following the 1974 amendments to the FLSA, the term "employer" is defined to "include[ ] a public agency." 29 U.S.C. § 203(d). The statute in turn defines "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State." *Id.*

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earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

[4] While our recitation of the history of the Equal Pay Act is helpful in understanding the context of the statutory provisions at issue, this history in itself has no bearing upon our inquiry into whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. Rather, that intent must be made "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *see also, e.g., Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("Congressional intent to abrogate Eleventh Amendment immunity must be expressed in the text of the statute; the Court will not look to legislative history in making its inquiry.").

§ 203(x). The FLSA defines "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." *Id.* § 203(e)(2)(C). Finally, the Act's private enforcement provision provides in pertinent part, "An action to recover the liability prescribed in either of the preceding sentences [including violations of § 206] may be maintained against any employer (*including a public agency*) *in any Federal or State court* of competent jurisdiction by any one or more employees." *Id.* § 216(b) (emphasis added).

In light of the plain statutory language, which authorizes "employees" to sue "public agencies" in federal court for violations of the Equal Pay Act, we have little difficulty holding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended § 216(b) in 1974. We have previously hinted at this holding in both *Mueller*, 133 F.3d at 1065, and *Ende v. Board of Regents*, 757 F.2d 176, 177 n.3 (7th Cir. 1985), and we make it explicit today. In so doing, we join the other circuits that have examined this issue in the context of both the Equal Pay Act and the FLSA. *See Close v. New York*, 125 F.3d 31, 36 (2d Cir. 1997) (FLSA); *Mills v. Maine*, 118 F.3d 37, 41-42 (1st Cir. 1997) (FLSA); *Aaron v. Kansas*, 115 F.3d 813, 814-15 (10th Cir. 1997) (FLSA); *Timmer*, 104 F.3d at 837-38 (Equal Pay Act); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc) (FLSA), *cert. denied*, 510 U.S. 946 (1993).

While the University concedes that the Equal Pay Act creates a private cause of action for state employees, it argues that the statute does no more than permit those employees to sue the States in their own courts. *Compare, e.g., Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987) (holding that the Jones Act does not abrogate the States' Eleventh Amendment immunity), *with Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (holding that the Federal Employers' Liability

Act, which provides the statutory remedial scheme for the Jones Act, creates a cause of action against state employers in their own courts). In this context, the University emphasizes that the statutory provisions discussed above do not contain any explicit references to the "Eleventh Amendment," or to "abrogation of state sovereign immunity." *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). We previously have concluded, however, that such "magic words" are unnecessary, because "that degree of explicitness is not required." *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *cf. Seminole Tribe*, 517 U.S. at 56-57 (holding that, even though the statute at issue did not refer explicitly to the Eleventh Amendment, "the numerous references to the 'State' in the text of [the statute] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit"). Rather, as we stressed in *Davidson*, all that is necessary is that Congress make "its desire to override the states' sovereign immunity clear[ ]" from the language of the statute. 920 F.2d at 443.

We recently addressed a similar assertion of Eleventh Amendment immunity by the State of Illinois under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 765-66 (7th Cir. 1998). *Goshtasby* explicitly reaffirmed *Davidson's* rationale on this point. *See id.* Moreover, *Goshtasby* rejected the notion that *Seminole Tribe* altered in any way the traditional inquiry to determine whether Congress unequivocally expressed its intent to abrogate. We concluded that *"Seminole Tribe* simply recycled [the] well-established verbiage in stating that Congress must be 'unmistakably clear.' The analysis was the same one federal courts have used for years." *Id.* at 766 (citations omitted). Thus, we

conclude that Congress expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act in 1974.

**B. Power to Abrogate**

But for the Supreme Court's holding in *Seminole Tribe*, our Eleventh Amendment inquiry into the Equal Pay Act would be complete, as the Equal Pay Act (along with the rest of the FLSA) clearly is within Congress's Commerce Clause powers. *See, e.g., Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985); *Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978). However, as we have discussed, *see supra* at 3-4, *Seminole Tribe* established that Congress may only abrogate the States' Eleventh Amendment immunity through legislation validly enacted pursuant to its § 5 enforcement powers.[5] Because we must determine whether

[5] Accordingly, all of the circuits to have addressed the issue following *Seminole Tribe* have held that the minimum wage and overtime provisions of the FLSA do not validly abrogate the States' Eleventh Amendment immunity. Those circuits have rejected, either explicitly or implicitly, the argument that the wage and overtime provisions serve a valid Fourteenth Amendment purpose. *See Powell v. Florida*, 132 F.3d 677, 678 (llth Cir.), *cert. denied*, 66 U.S.L.W. 3780 (U.S. June 8, 1998) (No. 97-1667); *Quillin v. Oregon*, 127 F.3d 1136, 1137 (9th Cir. 1997); *Close v. New York*, 125 F.3d 31, 38 (2d Cir. 1997); *Mills v. Maine*, 118 F.3d 37, 48-49 (lst Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 816-18 (l0th Cir. 1997); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 208-11 (6th Cir. 1996). In a case remanded to this Court by the Supreme Court for reconsideration in light of *Seminole Tribe*, we implicitly reached the same holding. *See Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1997) (stating that, in light of *Seminole Tribe*, "[t]he only issue is whether Wisconsin has waived its Eleventh Amendment immunity from suit in federal court under the FLSA" and citing *Mills, Raper,* and *Wilson-Jones*). Three of these courts, though, expressly reserved the question of whether the Equal Pay Act validly serves a Fourteenth Amendment purpose. *See Mills*, 118 F.3d at 48; *Aaron*, 115 F.3d at 817; *Raper*, 115 F.3d at 624. Moreover, the Sixth Circuit, in holdin that the Equal Pay Act validly abrogates the States' Eleventh Amendment immunity, noted that its holding was not in tension with its contrary holding in *Wilson-Jones*. *See Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 842 (6th Cir. 1997).

"the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate," *Seminole Tribe*, 517 U.S. at 59, we therefore are required to consider two questions: (1) whether Congress, in applying the Equal Pay Act to the States, did so pursuant to its § 5 powers and, if so, (2) whether the Equal Pay Act is within Congress's § 5 powers, as interpreted by the Supreme Court in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

**1. Whether Congress Exercised its § 5 Powers in Making the Equal Pay Act Applicable to the States**

In *EEOC v. Elrod*, 674 F.2d 601, 604-09 (7th Cir. 1982), we considered whether Congress had employed its § 5 enforcement powers when it amended the ADEA in 1974 to cover state employees.[6] Although we recognized that the 1974 amendments to the ADEA did not explicitly refer to Congress's § 5 powers, *id.* at 607-08, we did not believe that this fact was dispositive of our inquiry. Instead, we concluded that "the test of whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment requires no talismanic intoning of the amendment. Rather, the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment." *Id.* at 608 (citation omitted). Because we concluded that the objectives of the 1974 amendments to the ADEA were "clearly tied to the guarantee of the Equal Protection clause of the Fourteenth Amendment," we held that Congress acted pursuant to its § 5 enforcement powers when it extended the ADEA's coverage to state and local government employees. *See id.* at 608-09.

We recently have had two opportunities to consider *Elrod's* rule, in *Doe v. University of Illinois*, 138 F.3d 653, 657-60 (7th

[6] These amendments to the ADEA, Pub. L. No. 93-259, 88 Stat. 74, were in fact included in the Fair Labor Standards Amendments of 1974—the same legislation that amended the FLSA. *See Elrod*, 604 F.2d at 605.

Cir. 1998), and in *Goshtasby v. Board of Trustees of the University of Illinois*, 141 F.3d 761, 766-68 (7th Cir. 1998). In *Doe*, which considered the State of Illinois's Eleventh Amendment challenge to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, we explicitly reaffirmed *Elrod's* analysis, stating that "[t]he appropriate question is, were 'the objectives of [Title IX] . . . within Congress' power' " under the Fourteenth Amendment. 138 F.3d at 660 (alterations in original) (quoting *Elrod*, 674 F.2d at 608). Similarly, *Goshtasby*, which like *Elrod* addressed the ADEA, reaffirmed our holding in *Elrod*, concluding that "the rule remains that Congress need not use magic words to exercise its enforcement power under § 5 of the Fourteenth Amendment." 141 F.3d at 768. *See also Doe*, 138 F.3d at 678 (Easterbrook, J., respecting denial of rehearing en banc) ("Sex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons.").

Both *Goshtasby* and *Doe* also rejected the argument, which the University raises in the instant case, that *Elrod's* rule contravenes the Supreme Court's cautionary language that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981)). We recognized in *Doe* that the inquiries involved in both *Gregory* and *Pennhurst* were not similar to our inquiry into whether Congress acted pursuant to § 5 in enacting legislation, the substantive reach of which was clear. Rather, we concluded, those cases concerned the substantive reach of statutory provisions and whether Congress intended to subject the States to mandatory obligations by enacting legislation pursuant to its § 5 powers. *See Doe*, 138

F.3d at 658 & n.6; *see also Goshtasby*, 141 F.3d at 767-68. "In the present inquiry, by contrast, the intended result (of subjecting States to suit for violations of [the Equal Pay Act's] substantive provisions) is clear, and the grant of power under which Congress acted is at issue." *Doe*, 138 F.3d at 658. We therefore continue to adhere to the method of analysis set forth in *Elrod*, which is consistent with the long-recognized rule that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *see also EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (recognizing that "Congress need [not] anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'Equal Protection' " in order to exercise its § 5 powers).

The Equal Pay Act, however, presents an additional wrinkle that prevents us from proceeding immediately to consider whether the objectives of the Act are within Congress's § 5 powers. The FLSA as originally enacted explicitly stated that the statute constitutes an exercise of Congress's Commerce Clause powers. *See* 29 U.S.C. § 202(b); *see also United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of the FLSA as a valid exercise of Congress's Commerce Clause powers). Moreover, when Congress amended the FLSA in 1963 by passing the Equal Pay Act, it explicitly stated that it was relying on its authority to regulate interstate commerce. *See* Pub. L. No. 88-38, § 2(b), 77 Stat. 56, 56. This history would be unexceptional by itself, as it is consistent with Congress's pattern of enacting civil rights statutes under the Commerce Clause to regulate private conduct, as mandated by the holding of the *Civil Rights Cases*, 109 U.S. 3 (1883), and later amending those statutes pursuant to its § 5 authority to encompass government

conduct as well. *See, e.g., Elrod,* 674 F.2d at 606-08 (discussing this pattern with respect to Title VII and the ADEA).

The University contends, however, that Congress made a similarly express statement that it was exercising its powers under the Commerce Clause when it extended the FLSA to the States through the Fair Labor Standards Amendments of 1974. According to the University's argument, the Equal Pay Act is unlike the ADEA, in which Congress left the source of its power unstated when it extended the statute's coverage to the States. *See Goshtasby*, 141 F.3d at 767. Therefore, the University argues, the inquiry mandated by *Elrod*—whether the objectives of the statute are within Congress's § 5 powers—is simply inapplicable to this case. Rather, the University believes that we should take Congress at its word and definitively conclude that the 1974 amendments to the Equal Pay Act were enacted solely pursuant to its Commerce Clause powers.

As an initial matter, we note that another court of appeals has rejected the premise that Congress explicitly relied upon its Commerce Clause powers when it extended the Equal Pay Act's protections to the States. The Sixth Circuit, in addressing the identical question that is before us today, extensively analyzed the legislative history of the Fair Labor Standards Amendments of 1974[7] and reaffirmed its prior holding that "Congress did not expressly state the constitutional basis of its extension of the

[7] As our analysis in *Elrod* made clear, we must focus upon the particular legislation that extended a statute's coverage to the States, as opposed to the original statute itself, when determining the source of Congress's power. *See Elrod*, 674 F.2d at 604-08 (considering the 1974 amendments to the ADEA, as opposed to the original legislation enacted in 1967). *Accord, e.g., Mills v. Maine*, 118 F.3d 37, 43 (1st Cir. 1997) (considering the 1974 amendments to the FLSA as opposed to the original legislation); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n.7 (6th Cir. 1997) ("[T]he court properly focused on the 1974 amendments as opposed to the 1963 version of the Equal Pay Act. Although the 1974 legislation was an amendment to an already existing act, it was nevertheless a separate act of Congress.").

FLSA to the States in 1974." *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 (6th Cir. 1997). The court in *Timmer* noted that the report of the Senate Committee on Labor and Public Welfare, S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974), merely indicated the Committee's belief that "it had the power to extend the FLSA to the States under the Commerce Clause." [8] *Timmer*, 104 F.3d at 838-39 n.7.

The Equal Pay Act, which Congress designated as severable from the other protections of the FLSA, *see* 29 U.S.C. § 219, is mentioned only once in the Senate Committee's 116-page report, in a discussion of the FLSA's historical background. *See* S. REP. No. 93-690, *supra*, at 6. Indeed, the relevant legislative history indicates that Congress concentrated primarily upon extending the FLSA's minimum wage and overtime provisions when it passed the Fair Labor Standards Amendments of 1974. *See id.*; *see also Timmer*, 104 F.3d at 846 n.2 (Boggs, J., dissenting) ("The items debated were primarily the minimum wage and overtime provisions."); *cf. Elrod*, 674 F.2d at 605 (noting that "[l]ittle legislative history exists on the ADEA amendment, . . . because the breadth and significance of the amendments to the FLSA overshadowed the ADEA amendment"). Thus, we do not accept the University's contention, which is solely based upon a murky legislative history, that Congress expressly relied upon its

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[8] The report states, in part:

> The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce.

S. REP. No. 93-690, 93d Cong., 2d Sess. 24 (1974). *See also* H.R. REP. No. 93-913, 93d Cong., 2d Sess. 2 (1974) ("It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to . . . .").

Commerce Clause powers in extending the Equal Pay Act to the States. *Accord Mills*, 118 F.3d at 44 ("[O]ne cannot read Congress' statement regarding the Act's validity under the Commerce Clause to indicate that Congress intended to exclude other applicable constitutional bases for the Act.") (quotations and alteration omitted); *Timmer*, 104 F.3d at 838-39 n.7 ("We believe that this legislative history falls far short of an 'express statement' of congressional intent.").

Because we are unconvinced that Congress expressly declared its intention to proceed solely pursuant to its Commerce Clause powers, we conclude that *Elrod*'s analysis controls the present inquiry. Pursuant to this analysis, we have little difficulty in concluding that the objectives of the Equal Pay Act were within Congress's powers under the Fourteenth Amendment.[9] As we have discussed, *see supra* at 5-6 & n.3, the purpose of the Equal Pay Act is to prohibit arbitrary sex-based wage disparities. Prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604. Thus, we conclude that the Equal Pay Act constitutes an exercise of Congress's § 5 enforcement powers.[10]

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[9] We note that this conclusion is not dispositive of the issue of whether the extension of the Equal Pay Act to the States is constitutionally-valid legislation, which we consider *infra* at 16-22.

[10] Two other courts of appeals, in addition to the Sixth Circuit in *Timmer*, have arrived at the same conclusion. *See Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Those courts both rejected Tenth Amendment challenges to the Equal Pay Act under the then-prevailing rule of *National League of Cities v. Usery*, 426 U.S. 833 (1976), by holding that the Equal Pay Act was enacted pursuant to Congress's § 5 powers. We applied a different rationale to reject a Tenth Amendment challenge to the Equal Pay Act in *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), but we expressly reserved the question of whether the statute was also a proper exercise of Congress's § 5 powers. *See id.* at 6 n.19.

**2. Whether The Equal Pay Act is Within Congress's § 5 Enforcement Powers**

The University argues that Congress exceeded its power to enforce the Fourteenth Amendment when it extended the protections of the Equal Pay Act to the States. In this context, the University relies on the fact that the Equal Pay Act does not require proof of an employer's discriminatory purpose. *See Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) (recognizing that "the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown") (quotation omitted); *see also Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997). Because claims of discrimination under the Fourteenth Amendment require proof of purposeful discrimination, *see, e.g., Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979), the University contends that the Equal Pay Act is not within Congress's power "to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. We previously have addressed similar challenges to Title VII's imposition of disparate impact liability. *See Liberales v. County of Cook*, 709 F.2d 1122, 1135 (7th Cir. 1983); *United States v. City of Chicago*, 573 F.2d 416, 422-24 (7th Cir. 1978). We rejected those challenges, holding that the prohibition of policies that had a discriminatory impact was "plainly adapted" to the end of "enforc[ing] the anti-discrimination provisions of the Equal Protection Clause." *Id.* at 423. The University argues, however, that the Supreme Court's holding in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), altered our prior understanding of Congress's Fourteenth Amendment enforcement powers and warrants a different result in the instant case.

In *City of Boerne*, the Supreme Court addressed the constitutionality of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4. RFRA was a legislative response

to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court had held that the First Amendment's Free Exercise Clause did not require the States to provide exceptions from neutral, generally applicable laws that significantly burden religious practices. *See id.* at 887. Congress enacted RFRA, through its § 5 power to enforce the Due Process Clause, to overcome *Smith*'s holding. Accordingly, RFRA provided that laws that substantially burdened the exercise of religion must be justified as the least restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000bb-1.

The Court in *City of Boerne* considered whether legislative resurrection of the "compelling interest" test—"the most demanding test known to constitutional law," 117 S. Ct. at 2171—constituted a permissible exercise of Congress's § 5 power. The Court examined the legislative record and found that Congress did not enact this test in response to a history of unconstitutional conduct: "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 2169. The Court concluded that RFRA was "so out of proportion" to the burdens on religion that Congress identified and attempted to prevent that the statute could not be understood as an effort to respond to, or prevent, unconstitutional behavior. *See id.* at 2170. Rather, the Court determined that RFRA "attempt[s] a substantive change in constitutional protections," *id.*, such that the statute went beyond attempting to "enforce" an established constitutional right. Because "Congress's power under § 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," *id.* at 2164 (alteration in original), the Court struck down RFRA as unconstitutional. *See id.* at 2172.

This analysis clarified what had been an unsettled question in regard to Congress's authority to enforce the Fourteenth

Amendment. The Court rejected the substantive, or "ratchet" theory, expressed most forcefully in *Katzenbach v. Morgan*, 384 U.S. 641, 653-56 (1966), which maintained that Congress could expand the substantive rights contained in § 1 of the Fourteenth Amendment even when the courts had explicitly refused to recognize the existence of such rights.[11] In rejecting this theory, the Court explained, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*, 117 S. Ct. at 2164.

Accordingly, in order to determine whether legislation is appropriate under Congress's enforcement power, we must consider whether it deters or remedies unconstitutional conduct. *See id.* at 2163. However, legislation that satisfies this consideration may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *See id.* For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* at 2164.

The University posits that the Equal Pay Act, by not requiring proof of discriminatory intent, necessarily proscribes some state action that is constitutional. Because of this feature, the

[11] The Court in *City of Boerne* asserted that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." 117 S. Ct. at 2167. It did recognize that *Morgan* "could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment." *Id.* at 2168. However, the Court believed that this was "not a necessary interpretation, . . . or even the best one." Rather, the Court asserted that the legislation at issue in *Morgan* could be justified as a reasonable attempt by Congress to combat unconstitutional discrimination. *See id.*

University argues that the Equal Pay Act constitutes "substantive" legislation. This contention is not without some appeal.[12] The Supreme Court's recognition that Congress's "remedial" power "extends only to enforc[ing] the provisions of the Fourteenth Amendment" is difficult to reconcile with the Court's statement that remedial legislation may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 117 S. Ct. at 2163-64. The Supreme Court recognized this difficulty, stating that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.* at 2164. Nonetheless, "the distinction exists and must be observed." *Id.* Therefore, we reject the University's contention that the Equal Pay Act automatically constitutes inappropriate legislation merely because it proscribes some constitutional conduct.

Instead, we consider whether the Equal Pay Act satisfies *City of Boerne's* "proportionality and congruence" test. *See id.* In

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[12] The Supreme Court's distinction between substantive and remedial legislation has not been applied uniformly in the courts of appeals. In the context of Eleventh Amendment challenges to antidiscrimination statutes, the distinction has resulted in disarray. *Compare Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433, 1448 (11th Cir. 1998) (holding, in a splintered opinion, that the ADEA does not validly abrogate the States' Eleventh Amendment immunity), *with Goshtasby v. Board of Trustees of the Univ. of Illinois*, 141 F.3d 761, 772 (7th Cir. 1998) (holding that the ADEA is a proper exercise of Congress's enforcement power); *compare also Autio v. AFSCME, Local 3139*, 140 F.3d 802, 805 (8th Cir. 1998) ("In passing the [Americans with Disabilities Act (ADA)], Congress was not attempting to make a substantive constitutional change."), *with Coolbaugh v. Louisiana*, 136 F.3d 430, 440 (5th Cir. 1998) (Smith, J., dissenting) ("Both RFRA and the ADA purport to establish greater rights for individuals against the states by increasing the measure of judicial scrutiny for conflicting state actions to a level higher than the Supreme Court has found appropriate under the Fourteenth Amendment."), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 28, 1998) (No. 97-1941).

this context, it is significant that Congress inquired into the extent of sex-based wage discrimination in the workplace prior to enacting the Equal Pay Act.[13] *See, e.g.*, S. REP. NO. 176, 88th Cong., 1st Sess., 1 (1963). The Supreme Court has recognized that

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

*Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. REP. NO. 176, *supra*). Congress accordingly had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work. We accord these findings substantial deference, given that "Congress must have wide latitude," *City of Boerne*, 117 S. Ct. at 2164, to determine where the line lies between substantive and remedial measures. These legislative findings stand in contrast to RFRA, in which the legislative record was devoid of any reference to modern examples of the kind of unconstitutional conduct purportedly targeted by the legislation. *See City of Boerne*, 117 S. Ct. at 2169-70.

Moreover, in examining the provisions of the Equal Pay Act, we do not believe that their scope is out of proportion to the

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[13] Legislative findings in this context may be helpful to our inquiry. As the Supreme Court has recognized, however, they are not required. *See City of Boerne*, 117 S. Ct. at 2169-70 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'") (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970) (Harlan, J.)).

harms that Congress sought to redress. *See Goshtasby*, 141 F.3d at 772. In order to establish a claim under the Equal Pay Act, a plaintiff must demonstrate that the employer pays different wages to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). This, however, does not automatically establish liability. Rather, employers enjoy three specific affirmative defenses: that the wage differentials are due to either (i) a seniority system, (ii) a merit system, or (iii) a system that measures wages by quantity or quality of production. *Id.* In addition, employers may avoid liability under a catch-all provision that affords a defense when the differential is "based on any other factor other than sex." *Id.* § 206(d)(1)(iv); *see also Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989). The broad scope of these defenses protects employers from liability when the employer has sound reasons for wage disparities ("any other factor other than sex"), but they allow for liability when no such reasons exist. We believe that these statutory provisions are reasonably tailored to remedy intentional gender-based wage discrimination. *Cf. United States v. City of Chicago*, 573 F.2d 416, 423 (7th Cir. 1978) (holding that Congress's extension of Title VII's protections to government employees was "clearly rationally related to and consistent with the 'letter and spirit' of the Fourteenth Amendment"). As we recognized in *Goshtasby*, the fact that the statute's sweep includes some constitutional conduct is not fatal. *See* 141 F.3d at 423 (quoting *City of Boerne*, 117 S. Ct. at 2163). The Equal Pay Act, unlike RFRA, does not redefine the substantive rights of the Fourteenth Amendment, nor are its provisions

out of proportion to the harms that Congress intended to remedy and deter.[14]

Thus, in light of the above, we conclude that Congress validly abrogated the University's Eleventh Amendment immunity from suit under the Equal Pay Act.

### III. The Civil Rights Act of 1991

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 78 Stat. 253, to expressly abrogate the States' Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49 (1976). Title VII's definition of "person" was amended to include "governments, governmental agencies, [and] political subdivisions," 42 U.S.C. § 2000e(a), and the term "employer" is defined as a "person" who also satisfies other statutory conditions not relevant here. *Id.* § 2000e(b). The statute also defines the term "respondent" to include an employer. *Id.* § 2000e(n). Finally, the 1972 amendments included within the statute's definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *Id.* § 2000e(f). Title VII's enforcement provisions state that "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be

[14] In a footnote to its Equal Pay Act argument, the University's Brief states: "To the extent that plaintiffs assert disparate impact claims under Title VII, those claims raise identical Fourteenth Amendment concerns." If the University is attempting to argue that, in light of *City of Boerne*, we should overrule *City of Chicago* and *Liberales*, it has waived this argument. *See, e.g., United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) ("We repeatedly have made clear that perfunctory and undeveloped arguments . . . are waived (even where those arguments raise constitutional issues)."). At any rate, in light of the foregoing discussion, we see no reason to revisit those cases without the benefit of full briefing.

aggrieved," *id.* § 2000e-5(f)(1), and that "each United States district court . . . shall have jurisdiction of actions brought under this subchapter." *Id.* § 2000e-5(f)(3). These provisions make it unmistakably clear, as the Supreme Court recognized in *Fitzpatrick*, that Congress intended to abrogate the States' Eleventh Amendment immunity under Title VII. The University argues, however, that the Civil Rights Act of 1991 (CRA)—which for the first time provided a compensatory damages remedy for Title VII plaintiffs who proved intentional discrimination, *see* 42 U.S.C. § 1981a—does not contain a similar expression of legislative intent to abrogate.

The plain language of § 1981a shows that Congress intended to create an additional remedy for Title VII violations, as opposed to a separate cause of action. The statute provides:

> In an action brought by a complaining party under section 706 . . . of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5] against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under [42 U.S.C. 1981], the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(1). As the University concedes, Congress incorporated Title VII's definitional provisions into § 1981a. These definitional provisions establish that the States, as potential "respondents," *see supra* at 22, are within the class of employers from which a "complaining party" under § 1981a may recover

compensatory damages, and they are not elsewhere expressly excluded from that class. *See* 42 U.S.C. § 1981a(a)(1) & (b)(2). Section 1981a defines the term "complaining party" to include "a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964." *Id.* § 1981a(d)(1)(A). Thus, a "complaining party" in an "action brought" under Title VII may be entitled to compensatory damages by showing that a "respondent" (which includes State governments) engaged in unlawful intentional discrimination. Further, as we have indicated, Title VII confers jurisdiction upon the federal courts for "actions brought" under its provisions. *See* 42 U.S.C. § 2000e-5(f)(3). Therefore, we conclude that the Civil Rights Act of 1991 merely creates an additional remedy for actions brought under Title VII. *See, e.g., Williams v. Banning*, 72 F.3d 552, 553 (7th Cir. 1995) ("Congress amended Title VII in the Civil Rights Act of 1991 to permit victims of unlawful intentional discrimination to collect compensatory and punitive damages. . . ."). It does not, as the University contends, create a distinct cause of action that would require its own statement of abrogation. When Congress authorized compensatory damages claims against Title VII respondents (who may be sued in federal court), it expressed its intent to authorize such claims against the States.

Our conclusion is further buttressed by Congress's explicit *exclusion* of the States as respondents that may be subject to punitive damages claims under Title VII. *See* 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision). . . ."). No similar exclusion exists with respect to claims for compensatory damages. *See id* § 1981a(b)(2). Congress would have had no need to provide this explicit exception to the CRA's expanded

remedies unless it understood the remainder of those remedies—including compensatory damages claims—to apply to the States. Indeed, "a limitation of liability is nonsensical unless liability existed in the first place." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 (1989), *overruled on other grounds by Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). Thus, we believe that the language of § 1981a makes clear Congress's desire to add remedies to Title VII (including a compensatory damages remedy against the States), rather than a separate cause of action. Under Title VII, the abrogation of the States' Eleventh Amendment immunity is settled. *See Fitzpatrick*, 427 U.S. at 448-49.

For the foregoing reasons, we reject the University's assertion of Eleventh Amendment immunity with respect to both the Equal Pay Act and the Civil Rights Act of 1991. We therefore affirm the decision of the district court.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al.*,
*Plaintiffs,*

*v.*

ILLINOIS STATE UNIVERSITY, *et al.*,
*Defendants.*

Case No. 95-1355

**FILED**

JUL 30 1997

JOHN M. WATERS, Clerk
U.S. District Court
Central District of Illinois

**ORDER**

This matter is now before the Court on Magistrate Judge Robert J. Kauffman's Report & Recommendation and two Motions to Dismiss by Defendants. For the reasons set forth herein, the Report & Recommendation [#128] is adopted in part and rejected in part, Defendants' Motion to Dismiss [#71] is granted in part and denied in part, and Defendants' Motion to Dismiss [#18] is granted in part and denied in part as moot.

**Background**

The relevant facts of this case have been sufficiently set forth in the Report & Recommendation of the Magistrate Judge, as well as the prior Orders of this Court, and need not be restated here. Suffice it to say that this matter is brought on behalf of a

class including any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present. Plaintiffs allege that the class of women has been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. Plaintiffs further allege that Defendants engaged in retaliation against female professors who complained of their alleged employment practices.

On September 24, 1996, the Court ruled on a motion to dismiss filed with respect to the original Complaint ("Motion to Dismiss 1"). Motion to Dismiss 1 was premised upon the argument that Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Upon the filing of Plaintiffs' First Amended Complaint, Defendants revived this motion to dismiss, as well as a second motion to dismiss that had been filed prior to the case being transferred to this district ("Motion to Dismiss 2"). Motion to Dismiss 2 challenged Plaintiffs' ability to hold Defendants liable in their individual capacities under Title VII and the Equal Pay Act. This matter then was referred to the Magistrate Judge under Local Rule 72.1 for a report and recommendation.

On May 22, 1997, Magistrate Judge Robert J. Kauffman entered a Report & Recommendation which recommended that the motions be granted in part and denied in part. Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1), the parties had ten (10) working days after service of the Report & Recommendation to file objections to the Magistrate Judge's decision. Objections were timely filed on behalf of both parties. Additionally, the United States sought and was granted leave to file a brief as *Amicus Curiae* with respect to the issue of sovereign immunity. This Order follows.

**Discussion**

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

**I. Motion to Dismiss 1—Sovereign Immunity**

**A. Equal Pay Act Claims**

In their renewed Motion to Dismiss [#71], Defendants first allege that Plaintiffs' claims under the Equal Pay Act should be dismissed because the State of Illinois has not consented to be sued in federal court under this statute and such a suit is therefore barred by the Eleventh Amendment. Defendants rely on the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, U.S. , 116 S.Ct. 1114, 1123 (1996), which found:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985); and second, whether Congress has acted "pursuant to a valid exercise of power."

*Seminole Tribe*, 116 S.Ct. at 1123.

When last confronted with this issue in September 1996, the Court engaged in substantial analysis of the effect of *Seminole*

*Tribe* on suits brought pursuant to the Equal Pay Act. Ultimately, the Court determined that the portion of the Fair Labor Standards Act ("FLSA") constituting the Equal Pay Act was enacted to prohibit discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment, which is a valid exercise of Congressional power.[1] After careful consideration of the briefs submitted in connection with this issue, as well as subsequent case authority,[2] the Court remains confident that the prior decision is correct and constitutes the law of the case. To the extent that Defendants seek reconsideration of this Court's prior finding that the Equal Pay Act was properly enacted in furtherance of Congress' power under the Fourteenth Amendment, such a request is denied.

However, Defendants now argue for the first time that Congress did not clearly express its intent to abrogate the Eleventh Amendment in enacting the Equal Pay Act. As this Court's September 24, 1996 Order did not contain an in-depth discussion of this aspect of the *Seminole Tribe* test, the Court will elaborate now in the interest of making a complete record.

The intent to abrogate "must be obvious from 'a clear legislative statement.' " *Seminole Tribe*, 116 S.Ct. at 1123, *quoting Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 2584 (1991). Here, the Equal Pay Act itself contains neither definitions nor enforcement provisions. Rather, such

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[1] *Cf. Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (finding that the Americans with Disabilities Act, "like other antidiscrimination statutes," was an exercise of Congressional power under the Fourteenth Amendment, as well as the Commerce Clause).

[2] In *Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997), the Sixth Circuit affirmed the holding of *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), cited in this Court's September 24, 1996 Order. In so doing, the Sixth Circuit found that, although not expressly stated, Congress clearly and properly acted in furtherance of § 5 of the Fourteenth Amendment in extending the Equal Pay Act to state employees. *Timmer*, 104 F.3d at 838-39.

interpretative terms and mechanisms must be drawn from the context of the remainder of the FLSA.

> The term "employer" is defined in the FLSA to "include[ ] a public agency," which in turn is defined as "the government of a State or political subdivision thereof" and any agency of a State. 29 U.S.C. §§ 203(d), (x). The term "employee" is defined to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency. *Id.* § 203(e)(2)(C). Finally, the private enforcement provision provides that "[a]n action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

*Timmer*, 104 F.3d at 837-38. Such language makes it abundantly clear that Congress intended to permit actions against states and state agencies under the Equal Pay Act, thereby purposely abrogating sovereign immunity from suit.

Thus, the Court concurs with the other courts which have confronted this question with respect to the FLSA and reached the conclusion that the FLSA's current definitional and enforcement provisions, which are fully applicable to the Equal Pay Act, as well as the accompanying legislative history, provide an unmistakably clear statement of Congress' intent to abrogate the states' sovereign immunity.[3] Accordingly, the Court finds that Congress

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[3] *See also Brinkman v. Department of Corrections*, 21 F.3d 370, 372 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994); *Reich v. New York*, 3 F.3d 581, 590-91 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc), *cert. denied*, 114 S.Ct. 386 (1993). Furthermore, the Court notes that the FLSA definition of "employer" and enforcement provisions at issue are substantially similar to those set forth in the Age Discrimination in Employment Act, in which context the Seventh Circuit held such provisions to evidence Congress' clear "desire to override the states' sovereign immunity." *Davidson v. Board of Governors of State Colleges & Universities*, 920 F.2d 441, 443 (7th Cir. 1990).

clearly intended to abrogate the States' sovereign immunity from suit through the Equal Pay Act, and the portion of Defendants' Motion to Dismiss which requests dismissal of all claims based on the Equal Pay Act must be denied.

**B. Claims for Monetary Damages**

In their Objections to the Report & Recommendation, Defendants also raise the new argument that Plaintiffs' claims for monetary damages under § 1981a are barred by the Eleventh Amendment. Defendants contend that § 1981a contains no indication of any intent to abrogate sovereign immunity with respect to claims for compensatory and punitive damages, failing to satisfy the *Seminole Tribe* standard for abrogation of Eleventh Amendment immunity.

With respect to Plaintiffs' claims for punitive damages, the Court agrees with Defendants' position. Under § 1981a, governments, governmental agencies or political subdivisions are expressly excluded from liability for punitive damages. 42 U.S.C. § 1981a(b)(1). This interpretation is further supported by the relevant legislative history, which reveals that the purpose of the language in § 1981a was to establish that punitive damages are not available against state and local government defendants. *See* 137 Cong. Rec. S15445-02, S15460, S15472-01, S15484, H950501, H9527 (1991). Thus, the Court finds that Congress made no unequivocal expression of intent to abrogate the states' sovereign immunity with respect to punitive damages in enacting § 1981a, and the standard set forth in *Seminole Tribe* for a valid abrogation of sovereign immunity has not been satisfied. Accordingly, the portion of Plaintiffs' claims in Counts III and IV of the First Amended Complaint seeking punitive damages pursuant to § 1981a are barred, and Defendants' Motion to Dismiss will be granted in this respect.

Defendants also urge the Court to adopt their myopic view with respect to Plaintiffs' claim for compensatory damages and find no indication of Congressional intent in § 1981a itself. However, in considering the availability of compensatory damages, the Court finds that the appropriate analysis must reach further. It is clear that Title VII permits recovery of front pay, back pay, and other equitable relief against employers who violate its provisions but does not, as enacted, provide an avenue of relief with respect to monetary damages. *See* 42 U.S.C. § 2000e *et seq.* However, in 1991, Congress passed § 1981a to expand the remedies available to successful Title VII plaintiffs to include compensatory damages. *Blankenship v. Warren County, Virginia*, 931 F.Supp. 447, 450 (W.D.Va. 1996), *citing* H.R.Rep. No. 40(l), 102d Cong., 1st Sess. 65, 71 (1991), 1991 U.S.C.C.A.N. 549. While § 1981a does not technically amend Title VII but, rather, stands alone as a separate statutory provision, this is not dispositive. To the contrary, the Court concurs with the district court in *Blankenship* that an examination of § 1981a necessarily involves reference to the definitional and enforcement provisions of Title VII.

Section 1981a provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . prohibited under section 703, 704, or 717 of the Act . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in additional to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . from the respondent.

42 U.S.C. § 1981a(a)(1). Although a complaining party includes "a person who may bring an action or proceeding under Title VII

of the Civil Rights Act of 1964," 42 U.S.C. § 1981a(d)(1)(A), the term "respondent" is not defined by § 1981a. However, by its own terms, § 1981a looks to § 2000e to give meaning to its provisions. *Sattar v. Unocal Corp.*, 829 F.Supp. 331, 333 n.3 (N.D.Cal. 1993).

> To determine who qualifies as a respondent, one has no recourse but to look to § 2000e-5(b), which defines "respondent" as, *inter alia*, an "employer." . . . [I]t is beyond cavil that employers under Title VII include state employers. Therefore, § 1981a, which permits suits against respondents, allows suits against state employers as well.

*Blankenship*, 931 F.2d at 450. In other words, the term " '[r]espondent' can only be interpreted by reference to § 2000e and, thus, to the use of the word 'employer'." *Sattar*, 829 F.Supp. at 333 n.3.

Thus, the Court finds that by including the references to Title VII in the text of § 1981a and failing to provide an alternative definition, Congress expressed its intent that Title VII supply the definition of "respondent" for purposes of assessing liability under § 1981a. This, in combination with the other overt references to Title VII's enforcement and definitional provisions in the text of § 1981a, evidences Congress' intent in enacting § 1981a to supplement the remedies available under Title VII and expand its prior abrogation of the states' sovereign immunity. Furthermore, the legislative history of § 1981a evidences Congress' understanding that the provisions concerning compensatory damages would apply to the states. *See* 137 Cong. Rec. H9505-01, H9527 (1991) ("By reference to sections 703, 704 and 706 of Title VII, the statutory language of section [1981a] is explicit that compensatory damages are available against state and local governmental defendants . . . ."); 137 Cong. Rec. S15472-01, S15484 (1991) ("[C]ompensatory damages may be awarded against federal, state and local government

agencies . . . ."). Accordingly, in applying the first step of the two-part analysis set forth in *Seminole Tribe*, the Court concludes that Congress has provided a clear statement of its intent to subject states to claims for compensatory damages pursuant to § 1981a in federal court.

The second part of the *Seminole Tribe* analysis requires that Congress act "pursuant to a valid exercise of power" in attempting to abrogate sovereign immunity. 116 S.Ct. at 1123. In enacting § 1981a, Congress sought to expand the remedies available to plaintiffs in Title VII actions. The Supreme Court has held that Title VII constitutes a valid abrogation of the states' Eleventh Amendment immunity because Congress acted in furtherance of the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Seminole Tribe*, 116 S.Ct. at 1128; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976). Like Title VII, § 1981a provides additional remedies against discrimination in the workplace on account of sex, and Defendants cannot reasonably argue that Congress lacks power to provide remedies for discrimination under § 5 of the Fourteenth Amendment. As such, the Court finds that § 1981a is an anti-discrimination measure that may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law. Therefore, under *Seminole Tribe*, sovereign immunity would not insulate the State of Illinois from suit for compensatory damages pursuant to § 1981a, and Defendants' Motion to Dismiss 1 must be denied with respect to Plaintiffs' claims for compensatory damages in Counts III and IV.

## II. Motion to Dismiss 2—Individual Liability

### A. Equal Pay Act Claims

Defendants assert that the Equal Pay Act does not permit suits against defendants in their individual capacities. Although the Seventh Circuit has found that an individual employee may be named in lieu of the employer in an Equal Pay Act claim, *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987), the Court of Appeals did not decide the precise issue of whether an individual employee may be named in addition to the employing entity in this context. However, this issue has been addressed by other district courts in this circuit. In *Pommier v. James L. Edelstein Enterprises*, the Honorable Marvin E. Aspen held that the definition of the term "employer" as used in both the Equal Pay Act and Title VII is "identical," and case law in the Title VII area directs that an individual supervisor cannot be held personally liable for Equal Pay Act violations made as agent of the employer. 816 F.Supp. 476, 481 (N.D.III. 1993), *citing Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 412 (N.D.III. 1991). The district judge in *Weiss* likewise concluded that allegations against an individual regarding actions that were taken as an agent of the employer cannot result in individual liability. 772 F.Supp. at 412. *See also Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.III. 1994) (recognizing that neither Title VII nor the Equal Pay Act permits suits against individuals.)[4]

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[4] The Court also notes that although the decisions in *Witham v. Regency Savings Bank*, 1995 WL 723888 (N.D.III. December 5, 1995), and *Equal Employment Opportunity Commission v. Home by Hemphill. Inc.*, 1995 WL 683502 (N.D.III, November 16, 1995), technically allow allegations of individual liability under the Equal Pay Act to survive a motion to dismiss, the Court finds these opinions unpersuasive. In *Witham*, the Honorable Milton I. Shadur expressly stated that the court would be willing to entertain a motion for dismissal of the individual claim that was "properly supported by persuasive authority." 1995 WL 723888 at *1. Similarly, although leave to replead was

Whereas the Equal Pay Act derives its definition of "employer" from the Fair Labor Standards Act and "includes *any person acting directly or indirectly in the interest of an employer* in relation to an employee and includes a public agency," 29 U.S.C. § 203(d) (emphasis added), "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and *any agent of such a person*" is an employer under Title VII. 42 U.S.C. § 2000e(b) (emphasis added). Although this Court does not agree that the definitions of "employer" in Title VII and the Equal Pay Act are identical, the definitions may be functionally equivalent as applied. Furthermore, the remedies available under the applicable sections of the Equal Pay Act include unpaid minimum wages or unpaid overtime compensation, liquidated damages, reinstatement, and promotion. 29 U.S.C. § 216(b). Like the remedies available under Title VII, these are remedies which are more likely provided by an employer rather than an individual, and the language of the Equal Pay Act uses the term "employer" in the context of the entity paying the disparate wages. 29 U.S.C. §§ 216(b), 206(d)(1).

Additionally, the Court's review of the First Amended Complaint reveals that Plaintiffs' allegations against the named Defendants are directed toward actions purportedly taken by these persons in their capacities as agents for Illinois State University. Plaintiffs do not allege that any of these persons was acting outside the scope of their official capacities at the time they engaged in violations of the Equal Pay Act. Thus, there does not appear to be a basis for imposing personal liability against these individuals. Accordingly, this aspect of the Report & Recommendation is rejected, and Plaintiffs' claims against Defendants in their individual capacities are dismissed from Counts I and II.

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granted, the decision in *Hemphill* actually dismissed the claim of individual liability as insufficient. 1995 WL 683502 at *3.

**B. Title VII Claims**

In the Motion to Dismiss 2, Defendants also contend that they cannot be sued in their individual capacities for violations of Title VII and ask that Plaintiffs' claims in this regard be dismissed. In the Report & Recommendation, the Magistrate Judge concurs and recommends that Defendants' Motion to Dismiss the Title VII claims against the individuals in Counts III and IV, be granted. However, this Court's review of the Amended Complaint reveals that Counts III and IV, as amended, do not state any claim against Defendants in their individual capacities. Accordingly, the Court rejects this portion of the Report & Recommendation. This aspect of Motion to Dismiss 2 will be denied as moot.

**CONCLUSION**

For the reasons set forth herein, the Report & Recommendation is ADOPTED in part and REJECTED in part. Defendants' Motion to Dismiss [#71] is GRANTED IN PART and DENIED IN PART, and Defendants' Motion to Dismiss [#18] is GRANTED IN PART and DENIED IN PART AS MOOT. The previously imposed stay is now lifted, and this matter is referred to Magistrate Judge Kauffman for further proceedings.

ENTERED this 30th day of July, 1997.

Michael M. Mihm

MICHAEL M. MIHM
*Chief United States District Judge*

# UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF ILLINOIS

DR. IRIS VARNER, *et al*
*Plaintiff*

*vs.*

ILLINOIS STATE UNIVERSITY, *et al*
*Defendants*

Case No. 95-1355

**FILED**

MAY 22 1997

JOHN M. WATERS, Clerk
U.S. District Court
Central District of Illinois

## REPORT AND RECOMMENDATION

Now before the court are the defendants' Motions to Dismiss (#18 and #71), which were revived by motion following the filing of Plaintiffs' First Amended Complaint. The motions are fully briefed, and oral arguments were heard on February 27. Pursuant to Local Rule 72.1, the district judge has referred the matter to me for a report and recommendation. After carefully considering all of the submissions of the parties, and pursuant to 28 U.S.C. §636(b)(1)(B), I recommend that the motions be granted in part and denied in part.

## PROCEDURAL BACKGROUND

Plaintiffs Iris Varner, Teresa Palmer, and Paula Pomerenke, on behalf of themselves and a certified class, allege that defendants have violated the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991 (§1981), and the Civil Rights Act of 1871 (§1983).

Plaintiffs are all tenure track faculty at Illinois State University. Defendants are Illinois State University, four officials of the University, and members of the Board of Regents and its successor Board of Trustees in their official capacities. (The caption of the complaint indicates that these individuals are sued in both individual and official capacities. However, the body of the complaint reveals that relief is sought against the individuals in their official capacities only.)

The complaint was originally filed in the Northern District of Illinois. Upon a Motion to Dismiss or Transfer, Judge Zagel granted the motion to transfer and denied the motion to dismiss. A second motion to dismiss, filed after transfer to this court, was granted in part and denied in part by Judge Mihm, after which plaintiffs filed the First Amended Complaint.

The First Amended Complaint consists of five counts. Counts I and II, against the University and the board members in their official capacities, allege sex discrimination and retaliation in violation of the Equal Pay Act. Counts III and IV are also against the University and members of the board in their official capacities; these Counts claim violations of Title VII and §1981. Count V alleges a violation of §1983 against the individual defendants in their official capacity. After the amended complaint was filed, Defendants moved to revive the previous motions as they related to the amended complaint, a motion that was allowed.

Because one of the issues raised in the second motion to dismiss was the constitutionality of the two statutes at issue, the United States Attorney General was notified. Although the United States subsequently declined to intervene, the Attorney General requested that the court consider briefs on the same issue that had been filed in another case currently pending in this court.

The constitutional issue raised is whether Congress properly abrogated State immunity from Equal Pay Act liability under the Eleventh Amendment and *Seminole Tribe of Florida v. Florida,* U.S., 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). In an Order dated September 24, 1996, resolving the second motion to dismiss, Judge Mihm ruled that Congress had properly abrogated Illinois' sovereign immunity and that the State was not insulated from suit under the Equal Pay Act. Because this issue has been resolved in this case by the District Judge, I decline to reconsider the issue, believing the Order to constitute law of the case. To the extent the defendants had wished to revive this portion of the earlier motions, they may take up the Eleventh Amendment issues in objections to this Report and Recommendation.

The other issue raised is whether suit against the individual defendants is proper. That issue will be addressed in this Report and Recommendation.

## MOTIONS TO DISMISS

A complaint should not be dismissed unless it appears from the pleadings that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Gould v. Artisoft, Inc.*, 1 F.3d 544, 548 (7th Cir. 1993). Rather, it should be construed broadly and liberally in conformity with the mandate in Rule 8(f).

For purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff; its well-pleaded factual

allegations are taken as true, and all reasonably-drawn inferences are drawn in favor of the plaintiff. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Hishon v. King*, 467 U.S. 69 (1984); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *MCM Partners v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 969 (7th Cir. 1995); *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Yeksigean v. Nappi*, 900 F.2d 101 (7th Cir. 1990). In addition, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648 (7th Cir. 1984). If the plaintiff's claim as plead is "without legal consequence," dismissal is proper; *Grzan v. Charter Hospital*, 104 F.3d 116, 119 (7th Cir. 1997).

## DISCUSSION

### A. Individual liability under the Equal Pay Act

The Equal Pay Act, 29 U.S.C. §206(d) (EPA), is part of the Fair Labor Standards Act (FLSA). The latter statute defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . ." 29 U.S.C. §203(d). "Public agency" means "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivisions of a State." 29 U.S.C. §203(x). "Person" includes "an individual." 29 U.S.C. §203(a).

There are cases discussing individual liability under the EPA but this is an issue not yet addressed by the Supreme Court. The Seventh Circuit has mentioned it in dicta, *Riordan v. Kempiners*, 831 F.2d 690, 694-5 (7th Cir. 1987), but that reference seems to cut against defendants' position:

> For reasons unclear to us, [plaintiff's] lawyer decided to name . . . the director of the Department [] as the only

> defendant to her suit under the Equal Pay Act. The word "employer" is defined broadly enough in the Fair Labor Standards Act (of which the Equal Pay Act is an amendment) to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.

*Id.* at 694.

The Northern District of Illinois has ruled on the issue directly several times with inconsistent results. *See, Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094, 1098 (N.D.Ill. 1994) (finding individual liability under EPA); *Pommier v. James L. Edelstein Enter.*, 816 F.Supp. 476 (N.D.Ill. 1993) (same); and *Weiss v. Coca-Cola Bottling Co.*, 772 F.Supp. 407 (N.D.Ill. 1991) (same); *but see, EEOC v. Home by Hemphill, Inc.*, No. 95 C1138, 1995 WL 683502 (N.D.Ill. Nov. 16, 1995) (rejecting individual liability under EPA); and *Witham v. Regency Savings Bank*, 1995 WL 680313 (N.D.Ill. Nov. 13, 1995) (same). *See also, Bergstrom v. Univ. of New Hampshire*, 943 F.Supp. 130 (D.N.H.1996) (rejecting individual liability and criticizing *Pommier* as "thinly reasoned" and based in part on the erroneous conclusion that "employer" is defined identically in the EPA and Title VII). *Cf., Freemon v. Foley*, 911 F.Supp. 326 (N.D.Ill. 1995) (finding individual liability under Family and Medical Leave Act, which adopts definition of "employer" from FLSA).

In my opinion, the definition of "employer" in the FLSA clearly and unambiguously includes individuals. The cases cited above that have concluded differently have, as the New Hampshire court pointed out, simply assumed that the statutory definition is the same as is contained in Title VII and other employment statutes. It is not. Under the EPA, an individual may be held liable.

However, that conclusion does not mean that all individual co-employees, supervisors, officers and board members are accountable under the EPA. To determine if any "person" is an employer, courts look to such factors as the powers to hire and fire, to supervise and control work schedules or conditions of employment, to set rate and method of payment, and to maintain employment records. See, *Keenan v. Allan*, 889 F.Supp. 1320 (E.D.Wash. 1995), *aff'd.* 91 F.3d 1275. *Accord, Brock v. Hamad*, 867 F.2d 804 (4th Cir. 1989) (power to hire and direct employees); *U.S. Dept of Labor v. Cole Enter., Inc.*, 62 F.3d 775 (6th Cir. 1995) (CEO with significant ownership interest, significant control of business operation, power to determine salaries and to make hiring decisions is employer). These powers need not be exclusively exercised by the "person" who has been sued. *Freemon*, 911 F.Supp. 326; *Reich v. Cole Enter., Inc.*, 901 F.Supp. 255 (S.D.Ohio 1993) *aff'd,* 62 F.3d 775. If a director or officer has sufficient control over the entity that his decisions determine if a violation of the FLSA occurred, then the FLSA considers that "person" to be the "employer." *Dole v. Simpson*, 784 F.Supp. 538 (N.D.Ind.1991).

I believe the plaintiff's First Amended Complaint contains sufficient allegations to withstand a motion to dismiss. It may or may not be possible for plaintiff to develop evidence as to each of these individuals sufficient to withstand summary judgment, but that is an issue for another day. I recommend that the motion to dismiss the EPA claims against the individual defendants be denied.

**B. Individual Liability under Title VII as amended**

In *Williams v. Banning,* 72 F.3d 552 (7th Cir. 1995), the Seventh Circuit clearly held that there is no Title VII liability for individuals, unless the individual meets the statutory definition of "employer" independently of the entity. Otherwise, under Title VII, only the entity that is the employer is subject to suit.

*Accord, Geier v. Medtronic, Inc.*, 99 F.3d 238 (7th Cir. 1996) (supervisor does not fall within Title VII definition of employer); *Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996) (in sexual harassment Title VII suit in which supervisor was sued in official capacity, proper defendant was University not supervisor; summary judgment for supervisor affirmed).

The individuals named as defendants in this suit are not "employers." *See, Feltner v. Partyka*, 945 F.Supp.1188 (N.D.Ill.1996) (owners of company not "employers"); *Fernandez v. Wolff*, 919 F.Supp. 1120 (N.D.Ill. 1996) (university president and dean not "employers"); *Vakharia v. Little Company of Mary Hosp.*, 917 F.Supp. 1282 (N.D.Ill. 1996) (hospital officers not "employers"); *Whitechurch v. Apache Products Co.*, 916 F.Supp. 809 (N.D.Ill. 1996) (CEO not "employer"); *Briggs v. North Shore Sanitary Dist.*, 914 F.Supp.245 (N.D.Ill. 1996) (board of trustees member not "employer"). They are therefore not subject to suit under Title VII.

For this reason, I recommend that defendants' motion to dismiss the Title VII claims against the individuals in Counts III and IV be granted.

**C. Conclusion**

For the reasons stated above, I recommend that defendants' motion be granted as to the Title VII claims asserted in Counts III and IV and denied as to all other issues. Plaintiff should be directed to file an amended complaint. The parties are advised that any objection to this Report and Recommendation must be filed in writing with the Clerk within ten (10) working days after service of this Report and Recommendation. Fed.R.Civ.P.72(b); 29 U.S.C.636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views Inc. V. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTER this 22nd day of May, 1997.

ROBERT J. KAUFFMAN
*United States Magistrate Judge*

# UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF ILLINOIS

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DR. IRIS I. VARNER, DR. TERESA M. PALMER, and DR. PAULA J. POMERENKE, on their own behalf and on behalf of all others similarly situated,

*Plaintiffs,*

*v.*

ILLINOIS STATE UNIVERSITY; ROBERT W. JEFFERSON, Dean; DAVID STRAND, Provost; JOHN K. URICE, Vice President and Provost; THOMAS P. WALLACE, President; the Board of Regents; including DAVID T. MURPHY; CAROL K. BURNS; JOSEPH B. EBBESEN; CARL E. KASTEN; NANCY J. MASTERSON; PATRICIA A. MCKENZIE; JAMES W. MYLES; BARBARA SCHEIBLING; NIRANJAN SHAH; and WILLIAM SULASKI, individually and in their capacity as members of the Board of Regents,

*Defendants.*

Case No. 95-1355

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**FILED**

**SEP 24 1996**

**JOHN M. WATERS, Clerk**
**U.S. DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**

## ORDER

This matter is before the Court on Defendants' Motion to Dismiss [#71] and Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81]. For the reasons set forth below, the Defendants' Motion is GRANTED in part and DENIED in part, and Plaintiffs' Motion is DENIED.

### Background

On March 13, 1995, three female professors employed at Illinois State University ("the University"), Dr. Iris I. Varner, Dr. Teresa M. Palmer, and Dr. Paula J. Pomerenke, filed a Complaint against Illinois State University, four officials of Illinois State University, the Board of Regents, and the ten members of the board. The Complaint has been certified, as a class action on behalf of any female teaching faculty at Illinois State University who was an Assistant Professor, Associate Professor, or full Professor anytime during the period beginning with the 1982-1983 academic year up to and including the present.

The named Plaintiffs have been employed by the University as teaching faculty (in the case of one Plaintiff since 1969). Drs. Varner, Palmer, and Pomerenke allege that from the dates of their respective employment, they have been paid less than their male counterparts, given considerations of teaching experience, the number of classes and class size they taught, academic papers published, service to the University, and other matters to go to the quality of their services. The Complaint further alleges that the Defendants engaged in retaliation against female professors who complained of the Defendants' alleged employment practices.

## Jurisdiction

Plaintiffs brought this suit pursuant to the Equal Pay Act, 29 U.S.C. § 201, *et seq.*; Title VII of the Civil Rights Act, 42 U.S.C. § 2000, *et seq.*; and the Civil Rights Act of 1991, 42 U.S.C. § 1981, *et seq.* This Court has jurisdiction of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 201, *et seq.*; and the Civil Rights Act of 1991, 42 U.S.C. § 1981, *et seq.*

## Discussion

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

On August 14, 1996, Defendants filed a Motion to Dismiss, to which Plaintiffs filed a Response instanter on September 10, 1996. In support of their Motion to Dismiss, Defendants make the following arguments: (1) By adding a Defendant, Plaintiffs have amended the pleadings and should file an amended complaint; and (2) Plaintiffs cannot proceed in federal court on any claims based on the Equal Pay Act because the State of Illinois has not consented to suit. Each of these arguments will be addressed in turn.

John Urice ("Urice") was initially named as a Defendant in this case. However, Judge James B. Zagel of the Northern

District of Illinois dismissed Urice in an Order dated August 18, 1995 because Urice was not alleged to have participated in the basic claims of gender discrimination and had been sued in his individual capacity. Plaintiffs then filed a related suit making similar allegations against Urice, Case No. 96-1355. On July 15, 1996, Plaintiffs filed a Motion before this Court to add Urice as a Defendant once again. The Court granted Plaintiffs' Motion on July 26, 1996, stating that Urice was to be added as a named Defendant in this case, and Plaintiffs were to submit a voluntary dismissal regarding the related case against Urice. To date, Plaintiffs have taken no steps to implement this Court's Order.

Plaintiffs have not only failed to file an amended complaint adding Urice to the present case, but they have also failed to dismiss the related action. Rather, Plaintiffs state that they are exercising "an abundance of caution" and have moved to vacate the order they requested adding Urice as a Defendant in order "to keep the Title VII and § 1981 claims presented in 96-1355 separate from the issues raised by Defendants under the Equal Pay Act." (Plaintiffs' Resp. to Mot. to Dismiss at 2.) Plaintiffs have presented no logical or practical reason why two separate suits should be conducted based on the same set of facts and similar issues. Accordingly, Plaintiffs' Motion to Vacate Prior order is denied.

Defendants argue that adding a party generally requires an amendment to the Complaint. In the present case, they claim that the addition of Urice as a Defendant requires Plaintiffs to file an amended complaint because there are no allegations currently pending against him as a result of Judge Zagel's previous Order dismissing Urice from the case. Thus, without an amended complaint, Defendants claim that it is not currently possible to determine what allegations are pending against Urice.

While notice pleading may not require a plaintiff to plead in great detail, Rule 8 does require sufficient clarity to determine that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

> The primary purpose of these provisions is rooted in fair notice: Under Rule 8, a complaint "must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is."

*Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d, 771, 775 (7th Cir. 1994) (citations omitted). The Court also noted that a properly pled complaint allows the defendant to formulate an answer. *Id.* at 776. Additionally, "[w]here an amendment of pleadings is necessary for purposes of clarity or otherwise, after parties have been added, the complaint should be amended." *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414, 415 (D.C.N.Y. 1972) (quoting *Bartels v. Sperti, Inc.*, 73 F.Supp. 751 (S.D.N.Y. 1947)).

The Court granted Plaintiffs' Motion to add Urice as a Defendant with the understanding that the claims raised in the related case were similar to those raised in the present case and involved the same set of basic facts. In doing so, the Court sought to eliminate unnecessary duplication and maximize judicial efficiency. However, Plaintiffs have not amended their Complaint to add Urice. Based on Judge Zagel's previous dismissal of Urice from this case, principles of res judicata prevent Urice from being called upon once again to answer the same Complaint. To the extent that Defendants' Motion requests that the entire suit be dismissed on these grounds, that portion of the Motion to Dismiss is denied. Nevertheless, the portion of Defendants' Motion to Dismiss requesting that Urice be dismissed for failure to file an amended complaint stating any allegations against Urice is granted. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily

dismiss the related suit, Case No. 96-1355, in compliance with this Court's July 26, 1996 Order.

Defendants ask the Court to confirm that Urice, like the other Defendants in the case, may only be sued in his official capacity. Judge Zagel's August 18, 1995 Order held that Title VII did not permit suits against supervisory employees and dismissed all claims against Defendants in their individual capacities. However, Judge Zagel refused to dismiss claims against Defendants in their individual capacities with respect to the Equal Pay Act claims, with the exception of Urice. Thus, with respect to Title VII claims, Urice, like the other Defendants, may only be sued in his official capacity, but no such restriction would apply with respect to Equal Pay Act claims or other claims that may be made against Urice in the Amended Complaint.

In their Motion to Dismiss, Defendants also allege that any claims based on the Equal Pay Act or other parts of the Fair Labor Standards Act should be dismissed because the State of Illinois has not consented to suit in federal court and such a suit therefore is prohibited by the Eleventh Amendment. Defendants cite *Seminole Tribe of Florida v. Florida*, U.S. , 116 S.Ct. 1114 (1996), for the proposition that this Court lacks jurisdiction over these claims because Congress did not expressly waive the sovereign immunity afforded by the Eleventh Amendment to the United States Constitution.

In *Seminole Tribe*, the Court examined a provision of the Indian Gaming Regulatory Act ("the Act"), 25 U.S.C. § 2710(d)(3)(A), which requires that States negotiate in good faith with Indian tribes. The Act authorizes an Indian tribe to sue a State for breaching the duty to negotiate in good faith. 25 U.S.C. § 2710(d)(7). The Court found that Congress did not have the authority to waive Eleventh Amendment immunity under the Indian Commerce Clause and, therefore, federal courts do not have jurisdiction to hear cases arising under the Act

because the State had not consented to suit. *Seminole Tribe*, 116 S.Ct. at 1132-33.

Prior to the expansive view of sovereign immunity expressed in *Seminole Tribe*, the Supreme Court had recognized congressional authority to abrogate a state's sovereign immunity when legislation was enacted pursuant to either § 5 of the Fourteenth Amendment or the Interstate Commerce Clause, based on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273 (1989), respectively. *Seminole Tribe*, 116 S.Ct. at 1125. The Court overruled its prior holding in *Union Gas*, stating that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* The Court found that Congress could not overcome the jurisdictional bar of the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause because "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by Article III. *Id.* at 1132. However, the Court did not disturb its prior decisions with respect to legislation enacted pursuant to the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 1128. Thus, in the wake of *Seminole Tribe*, the only source of congressional authority capable of abrogating sovereign immunity under the Eleventh Amendment that has been recognized by the Supreme Court is legislation enacted pursuant to § 5 of the Fourteenth Amendment.

As noted by the Defendants, the Equal Pay Act is part of the Fair Labor Standards Act of 1938 ("FLSA"). Congress expressly

stated that it was enacting the FLSA pursuant to its power under the Commerce Clause:

> It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industies [sic] without substantially curtailing employment or earning power.

29 U.S.C. § 202(b); *see also Marshall v. City of Sheboygan*, 577 F.2d 1, 6 (7th Cir. 1978) (finding that the Equal Pay Act is a valid exercise of Congress' power under the Commerce Clause).

Plaintiffs admit that the FLSA was enacted pursuant to Congress' power under the Commerce Clause but argue that the portion of the FLSA constituting the Equal Pay Act was enacted in furtherance of the equal protection clause of the Fourteenth Amendment and therefore should be undisturbed by *Seminole Tribe*, citing *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978), in support of this position. In *Marshall*, the Sixth Circuit found that the Equal Pay Act amendments to the FLSA were authorized by § 5 of the Fourteenth Amendment. *Id.* at 119 (quoting *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1582 (1977), and *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977).

In *Allegheny County*, the Third Circuit rejected the proposition that because the Equal Pay Act is housed within the FLSA and uses its administrative and enforcement mechanisms, it is necessarily a Commerce Clause enactment. 544 F.2d at 155. Rather, "the Equal Pay Act is a separate law, enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" and "Congress has § 5 fourteenth amendment power to prohibit sex discrimination."

*Id.* The Fourth Circuit adopted this view in *Charleston County* adding that, unlike the other provisions of the FLSA:

> [T]he Equal Pay Act is an anti-discrimination measure; and, as such, may be viewed as an exercise of Congress' power to adopt legislation enforcing the Fourteenth Amendment's guarantee of equal protection of the law.

558 F.2d at 1170.

The Seventh Circuit has adopted analogous reasoning with respect to the Age Discrimination in Employment Act ("ADEA"), which was also amended to authorize suits against state, and local governments. *Equal Employment Opportunity Commission v. Elrod*, 674 F.2d 601 (7th Cir. 1982). In *Elrod*, the Seventh Circuit set forth the test for determining whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment as "whether the *objectives* of the legislation are 'within Congress' power under the amendment." 674 F.2d at 608 (emphasis in original).

The Seventh Circuit found that despite the fact that the ADEA was enacted pursuant to the Commerce Clause, it was also a valid exercise of Congress' power under the Fourteenth Amendment. *Id.* at 603; *see also, Davidson v. Board of Governors of State Colleges*, 920 F.2d 441, 443 (7th Cir. 1990). Prohibiting arbitrary or discriminatory government conduct is the "very essence" of the guarantee of equal protection under the Fourteenth Amendment. *Elrod*, 674 F.2d at 604. This reasoning is also consistent with the reasoning of the Supreme Court with regard to Title VII in *Fitzpatrick*, which was affirmed in *Seminole Tribe.* 116 S.Ct. at 1125, 1128.

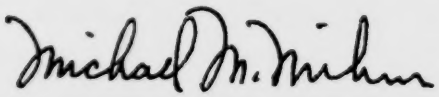
In light of the Seventh Circuit's reasoning in connection with the ADEA cases, this Court agrees with the position taken by the Third, Fourth, and Sixth Circuits that the portion of the FLSA constituting the Equal Pay Act was enacted to prohibit

discrimination in pay based on sex in furtherance of the equal protection clause of the Fourteenth Amendment. Therefore, sovereign immunity would not insulate the State of Illinois from suit under *Seminole Tribe*. Accordingly, the portion of Defendants' Motion requesting dismissal of all claims based on the Equal Pay Act is denied.

## CONCLUSION

For the reasons set forth herein, the portion of Defendants' Motion to Dismiss [#71] requesting dismissal with leave to file an amended complaint adding Urice as a defendant is GRANTED and the portion requesting dismissal of the Equal Pay Act claims is DENIED. Plaintiffs' Motion to Vacate Prior Order and for Extension of Time [#81] is DENIED. Plaintiffs have 21 days to file an Amended Complaint in this case including allegations against Urice and to voluntarily dismiss the related suit, Case No. 96-1355. This case is referred to Magistrate Judge Robert J. Kauffman.

ENTERED this 24th day of September, 1996.



MICHAEL M. MIHM
*Chief United States District Judge*

## FAIR LABOR STANDARDS ACT

### 29 U.S.C. §§ 201, *et seq.*

**§ 203. Definitions**

As used in this chapter—

* * * * *

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * * * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

**§ 206. Minimum Wage**

* * * * *

**Prohibition of sex discrimination**

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

**§ 216. Penalties**

* * * * *

**(b) Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of

this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

# CONSTITUTION
# OF THE
# STATE OF ILLINOIS

**Date Effective**

**Adopted at Special Election on December 15, 1970**

**General Effective July 1, 1971**

## ARTICLE I. BILL OF RIGHTS

### § 18. No Discrimination on the Basis of Sex

The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

# CHAPTER 775

# HUMAN RIGHTS

## ACT 5. ILLINOIS HUMAN RIGHTS ACT

## ARTICLE 1. TITLE, POLICY AND DEFINITIONS

### 775 ILCS 5/1-101

**5/1-101. Short title**

§ 1-101. Short Title. This Act shall be known and may be cited as the Illinois Human Rights Act.

### 775 ILCS 5/1-102

**5/1-102. Declaration of policy**

§ 1-102. Declaration of Policy. It is the public policy of this State:

**(A) Freedom from Unlawful Discrimination.** To secure for all individuals within Illinois the freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

**(B) Freedom from Sexual Harassment-Employment and Higher Education.** To prevent sexual harassment in employment and sexual harassment in higher education.

**(C) Freedom from Discrimination Based on Citizenship Status-Employment.** To prevent discrimination based on citizenship status in employment.

**(D) Freedom from Discrimination Based on Familial Status-Real Estate Transactions.** To prevent discrimination based on familial status in real estate transactions.

**(E) Public Health, Welfare and Safety.** To promote the public health, welfare and safety by protecting the interest of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities, and in furthering their interests, rights and privileges as citizens of this State.

**(F) Implementation of Constitutional Guarantees.** To secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970.

**(G) Equal Opportunity, Affirmative Action.** To establish Equal Opportunity and Affirmative Action as the policies of this State in all of its decisions, programs and activities, and to assure that all State departments, boards, commissions and instrumentalities rigorously take affirmative action to provide equality of opportunity and eliminate the effects of past discrimination in the internal affairs of State government and in their relations with the public.

**(H) Unfounded Charges.** To protect citizens of this State against unfounded charges of unlawful discrimination, sexual harassment in employment and sexual harassment in higher education, and discrimination based on citizenship status in employment.

## 775 ILCS 5/1-103

**5/1-103. General definitions**

§ 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

**(A) Age.** "Age" means the chronological age of a person who is at least 40 years old, except with regard to any practice

described in Section 2-102, insofar as that practice concerns training or apprenticeship programs. In the case of training or apprenticeship programs, for the purposes of Section 2-102, "age" means the chronological age of a person who is 18 but not yet 40 years old.

**(B) Aggrieved Party.** "Aggrieved party" means a person who is alleged or proved to have been injured by a civil rights violation or believes he or she will be injured by a civil rights violation under Article 3 that is about to occur.

**(C) Charge.** "Charge" means an allegation filed with the Department by an aggrieved party or initiated by the Department under its authority.

**(D) Civil Rights Violation.** "Civil rights violation" includes and shall be limited to only those specific acts set forth in Sections 2-102, 2-103, 2-105, 3-102, 3-103, 3-104, 3-104.1, 3-105, 4-102, 4-103, 5-102, 5A-102 and 6-101 of this Act.

**(E) Commission.** "Commission" means the Human Rights Commission created by this Act.

**(F) Complaint.** "Complaint" means the formal pleading filed by the Department with the Commission following an investigation and finding of substantial evidence of a civil rights violation.

**(G) Complainant.** "Complainant" means a person including the Department who files a charge of civil rights violation with the Department or the Commission.

**(H) Department.** "Department" means the Department of Human Rights created by this Act.

**(I) Handicap.** "Handicap" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such

characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:

(1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job or position;

(2) For purposes of Article 3, is unrelated to the person's ability to acquire, rent or maintain a housing accommodation;

(3) For purposes of Article 4, is unrelated to a person's ability to repay;

(4) For purposes of Article 5, is unrelated to a person's ability to utilize and benefit from a place of public accommodation.

**(J) Marital Status.** "Marital status" means the legal status of being married, single, separated, divorced or widowed.

**(K) National Origin.** "National origin" means the place in which a person or one of his or her ancestors was born.

**(L) Person.** "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, joint apprenticeship committees, or union labor associations, corporations, the State of Illinois and its instrumentalities, political subdivisions, units of local government, legal representatives, trustees in bankruptcy or receivers.

**(M) Public Contract.** "Public contract" includes every contract to which the State, any of its political subdivisions or any municipal corporation is a party.

**(N) Religion.** "Religion" includes all aspects of religious observance and practice, as well as belief, except that with respect to employers, for the purposes of Article 2, "religion" has the meaning ascribed to it in paragraph (F) of Section 2-101.

**(O) Sex.** "Sex" means the status of being male or female.

**(P) Unfavorable Military Discharge.** "Unfavorable military discharge" includes discharges from the Armed Forces of the United States, their Reserve components or any National Guard or Naval Militia which are classified as RE-3 or the equivalent thereof, but does not include those characterized as RE-4 or "Dishonorable".

**(Q) Unlawful Discrimination.** "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from military service as those terms are defined in this Section.

## ARTICLE 2. EMPLOYMENT

## 775 ILCS 5/2-101

### 5/2-101. Definitions

§ 2-101. Definitions. The following definitions are applicable strictly in the context of this Article.

(A) Employee.

(1) "Employee" includes:

(a) Any individual performing services for remuneration within this State for an employer;

(b) An apprentice;

(c) An applicant for any apprenticeship.

(2) "Employee" does not include:

(a) Domestic servants in private homes;

(b) Individuals employed by persons who are not "employers" as defined by this Act;

(c) Elected public officials or the members of their immediate personal staffs;

(d) Principal administrative officers of the State or of any political subdivision, municipal corporation or other governmental unit or agency;

(e) A person in a vocational rehabilitation facility certified under federal law who has been designated an evaluee, trainee, or work activity client.

(B) Employer.

(1) "Employer" includes:

(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;

(b) Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental handicap unrelated to ability or sexual harassment;

(c) The State and any political subdivision, municipal corporation or other government unit or agency, without regard to the number of employees;

(d) Any party to a public contract without regard to the number of employees;

(e) A joint apprenticeship or training committee without regard to the number of employees.

(2) "Employer" does not include any religious corporation, association, educational institution, society, or nonprofit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious

denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.

(C) Employment Agency. "Employment Agency" includes both public and private employment agencies and any person, labor organization, or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(D) Labor Organization. "Labor Organization" includes any organization, labor union, craft union, or any voluntary unincorporated association designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(E) Sexual Harassment. "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(F) Religion. "Religion" with respect to employers includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to

reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(G) Public Employer. "Public employer" means the State, an agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(H) Public Employee. "Public employee" means an employee of the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision. "Public employee" does not include public officers or employees of the General Assembly or agencies thereof.

(I) Public Officer. "Public officer" means a person who is elected to office pursuant to the Constitution or a statute or ordinance, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by the Constitution or a statute or ordinance, to discharge a public duty for the State, agency or department thereof, unit of local government, school district, instrumentality or political subdivision.

(J) Eligible Bidder. "Eligible bidder" means a person who, prior to a bid opening, has filed with the Department a properly completed, sworn and currently valid employer report form, pursuant to the Department's regulations. The provisions of this Article relating to eligible bidders apply only to bids on contracts with the State and its departments, agencies, boards, and commissions, and the provisions do not apply to bids on contracts with units of local government or school districts.

(K) Citizen Status. "Citizenship status" means the status of being:

(1) a born U.S. citizen;

(2) a naturalized U.S. citizen;

(3) a U.S. national; or

(4) a person born outside the United States and not a U.S. citizen who is not an unauthorized alien and who is protected from discrimination under the provisions of Section 1324b of Title 8 of the United States Code, as now or hereafter amended.

## 775 ILCS 5/2-102

**5/2-102. Civil rights violations—Employment**

§ 2-102. Civil Rights Violations—Employment. It is a civil rights violation:

**(A) Employers.** For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status.

**(B) Employment Agency.** For any employment agency to fail or refuse to classify properly, accept applications and register for employment referral or apprenticeship referral, refer for employment, or refer for apprenticeship on the basis of unlawful discrimination or citizenship status or to accept from any person any job order, requisition or request for referral of applicants for employment or apprenticeship which makes or has the effect of making unlawful discrimination or discrimination on the basis of citizenship status a condition of referral.

**(C) Labor Organization.** For any labor organization to limit, segregate or classify its membership, or to limit employment opportunities, selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely any person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or wages, tenure, hours of employment or

apprenticeship conditions on the basis of unlawful discrimination or citizenship status.

**(D) Sexual Harassment.** For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

**(E) Public Employers.** For any public employer to refuse to permit a public employee under its jurisdiction who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than such employee's regular working hours, consistent with the operational needs of the employer and in order to compensate for work time lost for such religious reasons. Any employee who elects such deferred work shall be compensated at the wage rate which he or she would have earned during the originally scheduled work period. The employer may require that an employee who plans to take time off from work in order to practice his or her religious beliefs provide the employer with a notice of his or her intention to be absent from work not exceeding 5 days prior to the date of absence.

**(F) Training and Apprenticeship Programs.** For any employer, employment agency or labor organization to discriminate against a person on the basis of age in the selection, referral for or conduct of apprenticeship or training programs.

**(G) Immigration-Related Practices.** For an employer to request for purposes of satisfying the requirements of Section 1324a(b) of Title 8 of the United States Code, as now or hereafter amended, more or different documents than are required under such Section or to refuse to honor documents tendered that on their face reasonably appear to be genuine.

It is not a civil rights violation for an employer to take any action that is required by Section 1324a of Title 8 of the United States Code, as now or hereafter amended.

## 775 ILCS 5/2-103

### 5/2-103. Arrest record

§ 2-103. Arrest Record. Unless otherwise authorized by law, it is a civil rights violation for any employer, employment agency or labor organization to inquire into or to use arrest information or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act[1] as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. This Section does not prohibit a State agency, unit of local government or school district, or private organization from utilizing conviction information obtained from the Department of State Police under the provisions of Section 3 of the Criminal Identification Act[2] in evaluating the qualifications and character of an employee or a prospective employee.

## 775 ILCS 5/2-104

### 5/2-104. Exemptions

§ 2-104. Exemptions.

(A) Nothing contained in this Act shall prohibit an employer, employment agency or labor organization from:

(1) Bona Fide Qualification. Hiring or selecting between persons for bona fide occupational qualifications or

any reason except those civil-rights violations specifically identified in this Article.

(2) Veterans. Giving preferential treatment to veterans and their relatives as required by the laws or regulations of the United States or this State or a unit of local government.

(3) Unfavorable Discharge From Military Service. Using unfavorable discharge from military service as a valid employment criterion when authorized by federal law or regulation or when a position of employment involves the exercise of fiduciary responsibilities as defined by rules and regulations which the Department shall adopt.

(4) Ability Tests. Giving or acting upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results, is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(5) Merit and Retirement Systems.

(a) Applying different standards of compensation, or different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination.

(b) Effecting compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately preceding retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans of the employer of such employee, which equals, in the aggregate, at least

$44,000. If any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits) or if the employees contribute to any such plan or make rollover contributions, the retirement benefit shall be adjusted in accordance with regulations prescribed by the Department, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c) Under January 1, 1994, effecting compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education as defined by Section 1201(a) of the Higher Education Act of 1965.[1]

(6) Training and Apprenticeship Programs. Establishing an educational requirement as a prerequisite to selection for a training or apprenticeship program, provided such requirement does not operate to discriminate on the basis of any prohibited classification except age.

(7) Police and Firefighter Retirement. Imposing a mandatory retirement age for firefighters or law enforcement officers if prior to December 31, 1993, the law enforcement officer or firefighter has attained the age of retirement in effect under applicable state or local law on March 3, 1983 and if such retirement action is taken pursuant to a bona fide retirement plan. This paragraph (7) shall not apply with respect to any cause of action arising under the Illinois Human Rights Act as in effect prior to December 3, 1987 (the effective date of Public Act 85-949).

(8) Police and Firefighter/Paramedic Appointment. Failing or refusing to hire or to discharge any individual because of such individual's age if such action is taken with respect to the employment of an individual as a firefighter/paramedic or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law, which provides a maximum age hiring limitation or for mandatory retirement, in effect on or before March 3, 1983.

As used in this paragraph (8):

(a) "Firefighter/paramedic" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, or to provide emergency medical services, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(b) "Law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of criminal offenses, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The provisions of this paragraph (8) shall remain in effect until December 31, 1993 or until similar provisions in Section 4 of the federal Age Discrimination in Employment Act of 1967 (29 U.S. Code 623) are deleted or repealed, whichever is later.

(9) Citizenship Status. Making legitimate distinctions based on citizenship status if specifically authorized or required by State or federal law.

(B) With respect to any employee who is subject to a collective bargaining agreement:

(a) which is in effect on June 30, 1986,

(b) which terminates after January 1, 1987,

(c) any provision of which was entered into by a labor organization as defined by Section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)), and

(d) which contains any provision that would be superseded by this amendatory Act of 1987 (Public Act 85-748),

such amendatory Act of 1987 shall not apply until the termination of such collective bargaining agreement or January 1, 1990, whichever occurs first.

## 775 ILCS 5/2-105

**5/2-105. Equal employment opportunities—Affirmative action**

§ 2-105. Equal Employment Opportunities, Affirmative Action.

(A) Public Contracts. Every party to a public contract and every eligible bidder shall:

(1) Refrain from unlawful discrimination and discrimination based on citizenship status in employment and undertake affirmative action to assure equality of employment opportunity and eliminate the effects of past discrimination;

(2) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(3) Provide such information, with respect to its employees and applicants for employment, and assistance as the Department may reasonably request.

(B) State Agencies. Every State executive department, State agency, board, commission, and instrumentality shall:

(1) Comply with the procedures and requirements of the Department's regulations concerning equal employment opportunities and affirmative action;

(2) Provide such information and assistance as the Department may request.

(3) Establish, maintain, and carry out a continuing affirmative action plan consistent with this Act and the regulations of the Department designed to promote equal opportunity for all State residents in every aspect of agency personnel policy and practice. For purposes of these affirmative action plans, the race and national origin categories to be included in the plans are: African American, Hispanic or Latino, Native American, Asian, and any other category as required by Department rule. This plan shall include a current detailed status report:

(a) indicating, by each position in State service, the number, percentage, and average salary of individuals employed by race, national origin, sex and disability, and any other category that the Department may require by rule;

(b) identifying all positions in which the percentage of the people employed by race, national origin, sex and disability, and any other category that the Department may require by rule, is less than four-fifths of the percentage of each of those components in the State work force;

(c) specifying the goals and methods for increasing the percentage by race, national origin, sex and disability, and any other category that the Department may require by rule, in State positions,

(d) indicating progress and problems toward meeting equal employment opportunity goals, including, if applicable, but not limited to, Department of Central Management Services recruitment efforts, publicity, promotions, and use of options designating positions by linguistic abilities;

(e) establishing a numerical hiring goal for the employment of qualified persons with disabilities in the agency as a whole, to be based on the proportion of people with work disabilities in the Illinois labor force as reflected in the most recent decennial Census.

(4) If the agency has 1000 or more employees, appoint a full-time Equal Employment Opportunity officer, subject to the Department's approval, whose duties shall include:

(a) Advising the head of the particular State agency with respect to the preparation of equal employment opportunity programs, procedures, regulations, reports, and the agency's affirmative action plan.

(b) Evaluating in writing each fiscal year the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction in recruiting, hiring or promotion needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed to cooperate fully or who are in violation of the program.

(c) Making changes in recruitment, training and promotion programs and in hiring and promotion procedures designed to eliminate discriminatory practices when authorized.

(d) Evaluating tests, employment policies, practices and qualifications and reporting to the head of the agency and to the Department any policies, practices and qualifications that have unequal impact by race, national origin as required by Department rule, sex or disability or any other category that the Department may require by rule, and to assist in the recruitment of people in underrepresented classifications. This function shall be performed in cooperation with the State Department of Central Management Services.

(e) Making any aggrieved employee or applicant for employment aware of his or her remedies under this Act.

(5) As used in this subsection (B), "disability" shall be defined in rules promulgated under the Illinois Administrative Procedure Act.[1]

(C) Civil Rights Violations. It is a civil rights violation for any public contractor or eligible bidder to:

(1) fail to comply with the public contractor's or eligible bidder's duty to refrain from unlawful discrimination and discrimination based on citizenship status in employment under subsection (A)(1) of this Section; or

(2) fail to comply with the public contractor's or eligible bidder's duties or affirmative action under subsection (A)(1) of this Section and subsection (A)(2) and (A)(3) of this Section, provided however, that the Department has notified the public contractor or eligible bidder in writing by certified mail that the public contractor or eligible bidder may not be in compliance with affirmative action requirements of subsection (A)(1) and with subsections (A)(2) and (A)(3) of this Section, and is given a minimum of 60 days to comply with the requirements.

Supreme Court, U.S.
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No. 98-1117

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,
*Petitioners,*

*v.*

DR. IRIS I. VARNER, *et al.*,
*Respondents,*

-and-

UNITED STATES OF AMERICA,
*Intervenor-Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS DR. IRIS I. VARNER, *et al.*

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## QUESTIONS PRESENTED

1. Whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act, 29 U.S.C. § 206(d), in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 29 U.S.C. §§ 203(d), 203(x), 203(e)(2)(C) and 216(b).

2. Whether Congress acted within its power under Section 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity in the amendments to the Equal Pay Act, 29 U.S.C. § 206(d).

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Respondents Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated, respectfully submit this Respondents' Brief in Opposition to the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

Respondents do not disagree with Petitioners' Statement of the Opinions Below.

## STATEMENT OF JURISDICTION

Respondents do not disagree with Petitioners' Statement of Jurisdiction.

## STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, as amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, provides in relevant part:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d). The statute, as amended, further provides:

> "Public agency" means the Government of the United States; the government of a State or

> political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x). The statute, as amended, further states in relevant part:

> . . . . An action to recover the liability prescribed in either of the prescribed sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of themselves and other employees similarly situated. . . .

29 U.S.C. § 216(b).

## STATEMENT OF THE CASE

### A. Proceedings in the District Court

Respondents do not disagree with Petitioners' Statement of the Proceedings In The District Court.

### B. Proceedings in the Circuit Court

The circuit court, applying *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985) and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in determining Congressional intent and *Seminole Tribe* and *City of Boerne v. Flores*, __ U.S. __, 117 S. Ct. 2157 (1997), in ascertaining Congress's power to manifest its intent,

affirmed the district court's decision that Congress, in a proper exercise of its legislative authority, abrogated the States' Eleventh Amendment immunity in its amendment of the Equal Pay Act.

The circuit court cited Congress' definition of "employer" to include "public agency," 29 U.S.C. § 203(d), its definition of "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State," 29 U.S.C. § 203(x), and its definition of "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." 29 U.S.C. § 203(e)(2)(C). The circuit court also cited the private enforcement provision of the statute which provides in relevant part that an action "may be maintained against any employer (including a public agency) in any Federal or state court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b) (App. at 8a). The circuit court concluded that these explicit statements expressed the unmistakably clear intent of Congress to abrogate the Eleventh Amendment immunity of the States (App. at 7a-8a) and rejected Petitioners' argument that the statute does not contain any explicit references to the "Eleventh Amendment" or "abrogation of state sovereign immunity" because use of such "magic words" is not required by *Dellmuth*, *Atascadero* and *Seminole Tribe*.

Acknowledging that under *Seminole Tribe* Congress must act pursuant to a constitutional provision granting it the power to abrogate the States' sovereign immunity (App. at 10a-11a), the circuit court also found that Congress, in applying the Equal Pay Act to the States, acted pursuant to its powers under Section 5 of the Fourteenth Amendment, under the standards and principles announced by this Court in *Boerne*. App. at 20a-23a.

The circuit court further recognized that while under *Boerne* Congress cannot expand the substantive rights contained in Section 1 of the Fourteenth Amendment when courts explicitly refuse to recognize the existence of such rights (App. at 19a), legislation that deters or remedies unconstitutional conduct is appropriate "even if in the process it prohibits conduct which is not itself unconstitutional." App. at 19a, *quoting from Boerne*, 117 S. Ct. at 2163. The circuit court then stated:

> For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Boerne*, 117 S. Ct. at 2164

App. at 19a.

In response to Petitioners' contention of a lack of proportionality under *Boerne* between the injury to be prevented and the means adopted to accomplish that end, the circuit court noted that Congress enacted the Equal Pay Act because it found that pervasive discrimination existed whereby women were paid less than men for equal work. App. at 21a-22a, *citing Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).[1] Such findings, the circuit court noted, stood in contrast to the relevant legislative record in

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1. Although Congress did not issue new findings when it extended the Equal Pay Act to the States in 1974, as the circuit court noted, such legislative findings are not required by *Boerne*. App. at 21a, n.13; *Boerne*, 117 S. Ct. at 2169-70. If anything, Congress's silence must be interpreted as a re-affirmation of the injury to be prevented, this time in the public workplace.

*Boerne* which was devoid of any modern examples of the kind of unconstitutional conduct targeted by the legislation reviewed in that case. App. at 21a.

After the circuit court announced its decision, Petitioners filed a request for rehearing and a suggestion for rehearing *en banc*, which was denied on October 13, 1998.

## REASONS FOR DENYING THE WRIT

### I.

### THE STANDARDS FOR GRANTING A WRIT OF CERTIORARI ARE NOT MET.

The Court should deny Petitioners' writ because the standards for certiorari are not met. None of the enumerated reasons for granting certiorari, set forth in United States Supreme Court Rule 10, is present.

As Rule 10 states, "compelling reasons" for review exist when:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10, Rules of the Supreme Court of the United States.

There is no state court decision implicated by the petition and so subsection (b) certainly does not apply. Neither does subsection (a) apply. The circuit court's decision cannot seriously be construed as a remote departure from the accepted and usual course of judicial proceedings, especially when it is in agreement with the decisions of every other circuit court to have ruled on the issue.[2]

Nor did the circuit court decide an important federal question in a way that conflicts with the decision of another United States court of appeals on the same important matter. The circuit court's decision is in agreement with every controlling decision from every other circuit court concerning whether Congress, in amending the Equal Pay Act, both

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2. The circuit court correctly stated the rules of this Court's precedents, *Dellmuth*, *Atascadero*, *Seminole Tribe* and *Boerne*. Although Petitioners contend that the circuit court's decision deviated from this Court's precedents, those arguments are without merit because, as set forth below, Petitioners have misstated this Court's precedents.

expressed the intent and possessed the power to abrogate the States' Eleventh Amendment immunity. *Ussery v. State of Louisiana*, 150 F.3d 431 (5th Cir. 1998); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 838-39 (6th Cir. 1997); *Usery v. Charleston County School Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977). Furthermore, the circuit court decision is in agreement with every other controlling circuit court decision concerning whether Congress, in enacting the Fair Labor Standards Amendments of 1974, clearly expressed the intent to abrogate the States' Eleventh Amendment immunity. *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998); *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Close v. New York*, 125 F.3d 31, 36 (2d Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 814-15 (10th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir.) (en banc), *cert. denied*, 510 U.S. 946 (1993).

The only decisions at the circuit court level contrary to the circuit court's decision are non-controlling decisions of individual judges that apply to statutes other than the Equal Pay Act. *Coolbaugh v. Louisiana*, 136 F.3d 430, 440 (5th Cir. 1998) (Smith, J., dissenting) (Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998) (Edmondson, J.) (expressing opinion of one judge on panel that Congress failed to express intent to abrogate in enacting Americans with Disabilities Act, but remaining silent on, if intent were expressed, whether abrogation would be proper exercise of Congressional power); *Kimel*, 139 F.3d at 1444 (Cox, J., concurring in part and dissenting in part) (stating opinion, shared with third judge on panel, that Congress clearly expressed intent to abrogate,

but writing separately that Congress lacked power to abrogate, in enacting Americans with Disabilities Act). A dissenting or concurring opinion delivered in one circuit where it is not controlling authority cannot present a compelling reason for granting certiorari within the meaning of Rule 10 when all controlling majority opinions, and therefore the circuits, are in agreement.

Petitioners are incorrect in their assertion that a district court split within the Eleventh Circuit[3] provides a compelling reason for granting certiorari within the meaning of Rule 10. The responsibility for resolving a split of opinion among district courts rests with the circuit court, not this Court. Only if the Eleventh Circuit were to conclusively decide the issue differently than all the other circuits to have decided the issue might Rule 10(b) apply.

Finally, Petitioners' reliance on *Humenansky* is misplaced. In that decision the Eighth Circuit merely held that legislation directed at discrimination against the aged was impermissibly substantive because "[a]ge is not a suspect class entitled to a heightened level of equal protection scrutiny." 152 F.3d at 827, *citing Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). The present case does not suffer from that infirmity, as gender is a suspect class. Thus, the reasoning in *Humenansky* is not in conflict with either the circuit court's decision because the circuit court's decision or Congressional enactment of the Equal Pay Act; each flows from the innumerable precedents of this Court

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3. *See Larry v. Board of Trustees of the Univ. of Alabama*, 975 F. Supp. 1447, 1449-50 (N.D. Ala. 1997) and *Belch v. Board of Regents of the Univ. Sys. of Georgia*, 1998 WL 824497 (M.D. Ga. Nov. 20, 1998).

that discrimination on the basis of sex does, indeed, call for a heightened level of equal protection scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). As a result, the circuit court's decision is not in conflict with the decision of another United States court of appeals on the same important matter.

For similar reasons to the ones stated above, subsection (c) of Rule 10 also fails to provide a basis for granting certiorari. The circuit court's decision applies and identifies the standards and principles announced by this Court's precedents, in a manner that is entirely consistent with relevant decisions of this Court. Likewise, the circuit court's application of precedent led it to rule consistently with the decisions of every other circuit that has ruled on the same issue. For these reasons, the circuit court's opinion does not decide an issue of federal law that needs to be settled by this Court. Therefore, none of the enumerated bases for granting certiorari is present.

Stripped to its essentials, then, Petitioners' argument is that the circuit court erred in its application of this Court's precedents. As Rule 10 explicitly states, such error "rarely" provides "compelling reasons" to justify the granting of certiorari. Even if this Court were to consider exercising its discretion to review on this basis alone, this Court nevertheless should not grant the petition because, as set forth below, the circuit court applied this Court's precedents properly in finding that Congress, in amending the Equal Pay Act, had both the intent and the power to abrogate the States' Eleventh Amendment immunity.

## II.

## IN AMENDING THE EQUAL PAY ACT, CONGRESS CLEARLY EXPRESSED ITS INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The circuit court joined every court of appeals to decide the question, in finding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act. *See Close*, 125 F.3d at 36; *Abril*, 145 F.3d at 186; *Ussery v. Louisiana*, 150 F.3d at 431; *Timmer*, 104 F.3d at 838-89; *Humenansky*, 152 F.3d at 825; *Hale*, 993 F.2d at 1391-92; *Aaron*, 115 F.3d at 814-15. Petitioners' contrary claim does not merit this Court's review.

Petitioners' argument that the circuit court did not base its decision on an examination of the text of the statute is premised on a misrepresentation of the record. The circuit court cited 29 U.S.C. §§ 203(d) and 203(x), which define "employer" to include "public agency" which includes the States. App. at 8a. The circuit court cited 29 U.S.C. § 203(e)(2)(C), which defines "employee" to include employees of the States. App. at 8a. The circuit court further cited 29 U.S.C. § 216(b), which provides a private right of enforcement "against any employer (*including a public agency*) *in any Federal or State court* of competent jurisdiction. . . ." App. at 8a. (emphasis by court). The circuit court did not identify, and Petitioners cannot point to, any materials on which it based its decision other than the text of the statute itself and this Court's precedents. App. at 6a-10a.

Contrary to Petitioners' argument, the circuit court made absolutely no citation to any legislative history. *Id.* While the circuit court did cite *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 279, 284-86 (1973), in which this Court

stated that 1966 amendments to the Fair Labor Standards Act did not abrogate the States' Eleventh Amendment immunity, the circuit court did so in reference to the Equal Pay Act as originally enacted in 1963 (which did not apply to state actors) and to the 1966 amendments to the Fair Labor Standards Act, which only served to clarify that the statutory regime reviewed by this Court in *Employees* is substantially different than the statute reviewed by the circuit court, because of the intervening 1974 amendments. Petitioners' attempt to distort this comparison provides no support for their fallacious argument that the circuit court based its decision on "legislative history" or statutory "structure," when the circuit court decision itself clearly indicates otherwise.[4]

Petitioners next contend that 29 U.S.C. § 216(b), in authorizing suits in "any Federal or state court of competent jurisdiction," fails to clearly express Congressional intent to abrogate. Petitioners argue that by referring to courts "of competent jurisdiction," Congress was referring to courts in which no defense of sovereign immunity would be available and, *ergo*, by authorizing suits against the States in Federal or state courts of competent jurisdiction, Congress was actually re-affirming, and not abrogating, the States' Eleventh Amendment immunity.

This argument is absurd. First, Petitioners concede that the Age Discrimination in Employment Act, 42 U.S.C.

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4. To support their argument that the circuit court based its decision regarding intent to abrogate on an impermissible consideration of statutory "structure," Petitioners rely on *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). However, *Nordic Village* deals solely with the Federal government's waiver of its sovereign immunity, and so has absolutely nothing to do with the inquiry into whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity.

§ 12202, contains a sufficiently clear expression of intent and, yet, that statute employs this precise phrase:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in a Federal or State *court of competent jurisdiction* for a violation of this chapter.

(Emphasis supplied). If, as Petitioners contend, a court of competent jurisdiction is a court where Eleventh Amendment immunity does not apply, then 42 U.S.C. § 12202 is a Congressional exercise in redundancy in its use of "competent jurisdiction."

Second, not all federal courts are courts of "competent jurisdiction" in which to bring suit on Equal Pay Act claims. Neither this Court, *see* 28 U.S.C. § 1251, nor the circuit court, *see* 28 U.S.C. § 1291, nor the United States Court of Federal Claims, *see* 28 U.S.C. § 1491, nor the United States Court of International Trade, *see* 28 U.S.C. § 1581, would have original jurisdiction over an Equal Pay Act claim because of statutory limits placed by Congress on the courts' jurisdiction. Rather, the United States District Court is the court properly authorized by statute to exercise original jurisdiction over such a claim. 28 U.S.C. §§ 1331 and 1343(a)(3). The language regarding "court of competent jurisdiction" has no relationship at all to Eleventh Amendment immunity, but was employed in 29 U.S.C. § 216(b) to coincide with the limitations on federal courts' subject matter jurisdiction that may be crafted from time to time by Congress.[5]

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5. Likewise, the only reasonable interpretation for the reference to state courts "of competent jurisdiction" in 29 U.S.C. § 216(b) is (Cont'd)

Petitioners' further argument — that the 1974 amendments to the Equal Pay Act evince only an intent to authorize suits against the States in state court — likewise is without merit, and the cases relied on by Petitioners are entirely distinguishable.

In *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468 (1987), the Court held merely that the Jones Act, 46 U.S.C. § 688(a), did not abrogate the States' Eleventh Amendment immunity, because it only extended a cause of action to any "seaman who shall suffer personal injury in the course of his employment." 483 U.S. at 475.[6] Once the Court had decided in *Welch* that no abrogation was intended, it was left to the Court in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), to decide the residual issue of whether a claim under the Jones Act was cognizable against the States in state court. The Court in *Hilton* made its decision on *stare decisis* grounds and stated that *Welch* had no bearing on the residual issue because "the Eleventh Amendment does not apply in state courts." 502 U.S. at 204-05. Petitioners' argument that the circuit court improperly conflated two analyses is therefore baseless. The circuit court never arrived at the conclusion that Eleventh Amendment immunity was not abrogated and so was not confronted with the residual issue of *Hilton*,

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(Cont'd)
the contemplation of state statutes governing the jurisdictional authority of the various state courts.

6. By contrast, as the circuit court found, the Equal Pay Act makes explicit reference to the States as employers who are subject to suit in Federal court. App. at 9a.

whether under such circumstances a valid cause of action remains cognizable in state court.[7]

The fact that cases under other sections of the Fair Labor Standards Act are not cognizable in federal court is extraneous to the issue of Congressional intent to abrogate. Rather, that fact stems from Congress's inability to employ the Commerce Clause as a basis for its power to abrogate. *Seminole Tribe*, 517 U.S. at 63-66. As the court in *Aaron* stated,

> The FLSA's extension of liability to states, coupled with its provision allowing suits in federal court, make clear Congress' intent to abrogate the states' Eleventh Amendment immunity with regard to claims brought under the FLSA.

115 F.3d at 815. However, *Aaron* held that Congress had no power to abrogate immunity for the wage and overtime claims before it because such claims were not within the scope of Congress' enforcement power under the Fourteenth Amendment. 115 F.3d at 816-17.[8] Therefore, *Aaron* offers Petitioners no support on intent to abrogate.

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7. Petitioners' argument that abrogation must take into account where the States are to be sued, as well as whether they are to be sued, is misguided. Petitioners rely on a passage from *Welch* discussing the separate and unrelated doctrine of *waiver* of immunity. 483 U.S. at 473-74. There is no argument here that the States have waived their immunity. Rather, the inquiry is Congressional *abrogation* of that immunity which, as the Court in *Welch* recognized, is a separate inquiry.

8. Indeed, *Aaron* explicitly reserved the specific question that Petitioners wish this Court to address, and so provides absolutely no support for their claims. 115 F.3d at 817.

Other precedents of this Court are also distinguishable. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court held that a statute that referred only to "any recipients of federal assistance" did not clearly abrogate Eleventh Amendment immunity. 473 U.S. at 245. Likewise, in *Dellmuth*, 491 U.S. at 223, the Court found that a statute providing judicial review for aggrieved parties "in any State court of competent jurisdiction or in a district court of the United States . . ." but which did not specifically enumerate States among the persons that could be sued under the statute, did not clearly abrogate the States' Eleventh Amendment immunity. The Equal Pay Act, by contrast, as the circuit court found, specifically lists the States among the persons that can be named as defendants in civil actions. App. at 9a.

Petitioners' final argument regarding intent to abrogate is the supposed incongruous result of the Federal government becoming subject to suit in state court if Congress indeed intended to abrogate the States' Eleventh Amendment immunity when it amended the Equal Pay Act in 1974. This argument, founded upon a misstatement of the law, is devoid of logic.

Whether and how the United States subjects itself to suit has nothing to do with abrogation of immunity, and instead is a species of waiver of immunity. Abrogation of immunity and waiver of immunity, as this Court has recognized, require two entirely separate inquiries. *Welch*, 483 U.S. at 473-74. Therefore, interpretation of the effect of 29 U.S.C. § 216(b) on the abrogation of States' Eleventh Amendment immunity need not parallel interpretation of the effect of 29 U.S.C. § 216(b) on the waiver of the Federal government's sovereign immunity. Petitioners present no authority to support the proposition that the abrogation analysis and the separate

waiver analysis must necessarily reach the same result.[9] However, even if the Court were to conclude that the abrogation analysis should necessarily track the waiver analysis, this still would not result in the dire consequences to public policy that Petitioners predict. 28 U.S.C. § 1442(a) grants to the United States, its officers and agencies the right to remove any suit filed in state court to the United States district court.

## III.

## IN AMENDING THE EQUAL PAY ACT, CONGRESS PROPERLY EXERCISED ITS POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Every court of appeals to address the question has ruled that the extension of the Equal Pay Act to the States was done properly and pursuant to Congress's power under Section 5 of the Fourteenth Amendment. *Ussery v. Louisiana*, 150 F.3d at 431; *Timmer*, 104 F.3d at 838-89; *Usery v. Charleston*, 558 F.2d at 1171; *Usery v. Allegheny*, 544 F.2d at 155. Petitioners' convoluted arguments to the contrary do not merit this Court's review.

The circuit court, applying *Boerne*, held that the Equal Pay Act was both proportionate and congruent to the constitutional harms Congress sought to prevent (App. at 21a-22a) and that the statute, with its "broad scope of . . . defenses [that] protects employers from liability when the employer has sound reason for wage disparities . . . other than sex,"

9. Petitioners cite *United States v. King*, 395 U.S. 1 (1969). However, *King* does not even address abrogation of States' immunity and nowhere does it state that the two analyses must necessarily track one another.

was reasonably tailored to remedy intentional, gender-based wage discrimination, even though the circuit court found that some discrimination would still fall within the scope of the Equal Pay Act when the level of intent needed to prove a constitutional violation did not exist. App. at 19a-22a.

As the circuit court acknowledged, Congress enacted the Equal Pay Act in 1963 in reaction to the serious and endemic problem of employment discrimination in American industry, and directed its remedial effort solely to the private sector. *Corning Glass Works, Inc. v. Brennan*, 417 U.S. 188, 195 (1974). This in no way intimates that Congress intended to permit the States to be immune from any liability for engaging in unconstitutional sex-based discrimination because in 1974 Congress lengthened the reach of the legislation to encompass the public sector.

The Congressional finding of sex-based discrimination "in many segments of American industry" was properly granted "substantial deference" by the circuit court. App. at 21a. The circuit court acknowledged that, under *Boerne*, 117 S. Ct. at 2164, Congress is given wide latitude to determine where substantive legislation ends and remedial legislation begins. App. at 21a. However, as this Court stated in *Boerne*, 117 S. Ct. at 2169-70, and as the circuit court acknowledged, App. at 21a, n.13, legislative findings in this context are not even required. Therefore, it is of no consequence that when Congress amended the Equal Pay Act in 1974 to extend application to the States, it did not restate its findings from 1963 regarding the pervasive nature of sex discrimination and specify that State actors also engaged in unlawful sex discrimination. The 1974 amendment, itself, makes patently clear the existence of this discriminatory problem in the public sector. No additional "finding" was made, nor was one required. *See Boerne*, 117 S. Ct. at 2169-70.

Petitioners' argument that the Equal Pay Act fails to satisfy the *Boerne* test of congruence and proportionality because it does not require proof of discriminatory intent is a gross exaggeration of the legislation, and is without merit. While it is true that the statute permits an aggrieved party to establish a prima facie case without proving discrimination, as the circuit court opinion relates in detail, the Equal Pay Act provides employers with three affirmative defenses (29 U.S.C. §§ 206(d)(1)(i) through (iii)), plus one catch-all provision that affords employers a defense when pay differential is "*based on any factor other than sex.*" (29 U.S.C. § 206(d)(1)(iv)) (App. at 22a) (emphasis supplied). Therefore, rather than eliminating proof of discrimination, Congress merely shifted the burden of proof, *i.e.*, a wage disparity between a male and female doing the same work creates a rebuttable presumption of gender discrimination which requires the employer to come forward with some basis for the disparity other than gender discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (authorizing similar burden-shifting schemes under Title VII). Therefore, given the expansiveness of the defenses available to an employer, the likelihood of the Equal Pay Act ensnaring a non-discriminating employer is negligible. The circuit court concluded that, given the breadth of defenses available to employers, the Equal Pay Act is reasonably tailored to remedy intentional gender-based wage discrimination. App. at 22a-23a. The circuit court further found that the Equal Pay Act, unlike the legislation in *Boerne*, did not redefine substantive Fourteenth Amendment rights (App. at 22a-23a), and determined that the Equal Pay Act was in proportion to, and congruent with, the goal of deterring and remedying the unconstitutional conduct of intentional discrimination on the basis of sex. App. at 20a-23a.

Even accepting the circuit court's indication that some degree of unintentional, constitutional conduct could be snared in the Equal Pay Act net, the circuit court correctly stated that, under *Boerne*,

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.

117 S. Ct. at 2163. In *South Carolina v. Katzenbach*, 383 U.S. 301, 325-37 (1966) and *City of Rome v. United States*, 446 U.S. 156, 177 (1980), for example, this Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory effect is shown. *See also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment).

Congressional authority to prevent sex discrimination is equally broad. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), where in the context of a sex discrimination claim the Court held that the Eleventh Amendment is necessarily limited by Section 5 of the Fourteenth Amendment, the Court stated:

> We think that Congress may in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456. There can be no question that the Equal Pay Act is appropriate legislation under *Fitzpatrick*, and that *Fitzpatrick* survives *Boerne*. *See* 117 S. Ct. at 2163.

Petitioners also argue that the circuit court misapplied *Boerne* by failing to find "exceptional conditions" that would warrant the Equal Pay Act's extension to some conduct where no discriminatory intent is proven. Petitioners' reliance on *Boerne* and *South Carolina v. Katzenbach* is misguided because neither precedent requires a finding of "exceptional conditions" to support Congress' exercise of its power under Section 5 of the Fourteenth Amendment.

The statute at issue in *Boerne* imposed a strict scrutiny standard on all state action substantially burdening religion even though there was little evidence of widespread constitutional violations. 117 S. Ct. at 2168-72. The Equal Pay Act seeks only to enforce the settled constitutional right to be free of gender discrimination in salaries, by establishing a remedial scheme that is carefully tailored to detect and prevent those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. And, while the Court in *Boerne* found the record lacked "examples of modern instances" of intentional discrimination against religion, 117 S. Ct. at 2169,[10] Congress,

10. Petitioners further misstate the law when they contend that *Boerne* was based "entirely" on the absence in the legislative record of evidence of religious discrimination by the states. Actually, the Court stated that this was not the statute's most serious shortcoming. 117 S. Ct. at 2169-70.

in enacting the Equal Pay Act, recognized that employers intentionally and systematically paid women less than men.[11] Furthermore, *Boerne* was not based on the absence of a narrow set of "exceptional conditions," but rather on the exceptionally broad nature of the statute at issue there. Whereas the Equal Pay Act is directed at one practice, gender-based pay inequity, the statute in *Boerne* was

> . . . not so confined. Sweeping coverage insures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

117 S. Ct. at 2170.

Likewise, *South Carolina v. Katzenbach* does not require findings of "exceptional" circumstances or conditions. 383 U.S. at 324. And, *Boerne* stated that the specific findings of *South Carolina v. Katzenbach* were not a required component of proper remedial legislation: "This is not to say, of course, that section 5 legislation requires termination dates, geographic restrictions or egregious predicates." 117 S. Ct. at 2170-71. Therefore, Petitioners' argument to the contrary is without merit.[12]

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11. *See Corning*, 417 U.S. at 195; *Kahn v. Shevin*, 416 U.S. 351, 353 (1974).

12. Unlike the Equal Pay Act, which addresses one practice, gender-based pay inequity, *South Carolina v. Katzenbach* confronted the Court with several different practices to be proscribed by the legislation before it. Accordingly, the Court examined the propriety of forbidding each such practice. *South Carolina v. Katzenbach* simply does not require a multiple section-by-section analysis of a statute such as the Equal Pay Act that is aimed at one particular practice.

Equally meritless is Petitioners' argument that evidence of general societal discrimination against women is an insufficient basis upon which to authorize the Equal Pay Act under Section 5 of the Fourteenth Amendment, and contention that *Boerne* compels a finding that the States have engaged in intentional unconstitutional discrimination against women. First, the fact that Congress specifically amended the Act in 1974 to reach into the public workplace is, itself, a powerful statement that state and local attempts (or lack of attempts) had failed to redress this discriminatory situation.[13] Second, *Boerne* explicitly stated that no findings at all were required. 117 S. Ct. at 2169-70 ("It is for Congress to determine the method by which it will reach a decision."). *See also* 117 S. Ct. at 2170-71 (remedial legislation does not require findings of "egregious predicates").[14] Third, Petitioners concede that Congress cannot act "wholly independent of the Supreme Court's case law." Petition at 23, n.11. That case law firmly establishes the history of pervasive and intentional discrimination against women by the States. *See generally United States v. Virginia*, 518 U.S. at 531-33.[15]

13. Petitioners' further argument, that the Equal Pay Act is not properly circumscribed under *Boerne* because Congress decided not to confine suits alleging a violation of the Act to the courts of the very State alleged to have violated the Act, is a less-than-makeweight contention.

14. This statement from *Boerne* directly refutes Petitioners' erroneous contentions that Congress was required to identify specific Constitutional violations by the States when it amended the Equal Pay Act in 1974, or that abrogation of Eleventh Amendment immunity requires legislative findings that the States violated women's Constitutional rights.

15. In *United States v. Virginia*, this Court cited the once-prevalent doctrine "that government, both federal and state, could withhold from

(Cont'd)

Finally, Petitioners contend that Illinois' statutory schemes are sufficient to protect the class. This argument is not relevant because authorization of a cause of action cognizable against the States only in state court can never be an abrogation of Eleventh Amendment immunity and so can never be a proportional or congruent abrogation of immunity under *Boerne*. However, the argument proceeds from the inaccurate suggestion that the Illinois statutory scheme provides the same rights and remedies as the Equal Pay Act. First, the Illinois statutes proffered by Petitioners do not explicitly state that gender-based pay inequity is unlawful, as does the Equal Pay Act. Second, those Illinois statutes do not explicitly provide for class relief, as does the Equal Pay Act. Therefore, Petitioners have no basis upon which to argue that the Equal Pay Act is merely redundant of rights conferred under state statutory regimes, even if that were a relevant consideration to the issues that Petitioners ask this Court to review, which it is not.

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(Cont'd)
women opportunities accorded men so long as any basis in reason could be conceived for the discrimination." 518 U.S. at 531. *See also id.* ("our Nation has had a long and unfortunate history of sex discrimination").

## CONCLUSION

On the basis of the foregoing, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, ET AL., PETITIONERS

*v.*

IRIS I. VARNER, ET AL.

AND

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

## QUESTIONS PRESENTED

1. Whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. 206(d).

2. Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963 falls within Congress's power under Section 5 of the Fourteenth Amendment.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1117

ILLINOIS STATE UNIVERSITY, ET AL., PETITIONERS

*v.*

IRIS I. VARNER, ET AL.

AND

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-26a) is reported at 150 F.3d 706. The opinions of the district court (Pet. App. 27a-38a, 47a-56a) are reported at 972 F. Supp. 458 and 986 F. Supp. 1107, respectively. The report and recommendation of the magistrate judge (Pet. App. 39a-46a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on July 21, 1998. A petition for rehearing was denied on October 13, 1998. Pet. App. 1a. The petition for a writ of

certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Respondents represent a class of female professors employed by petitioners Illinois State University and its Board of Regents. Pet. App. 48a. Respondents alleged, among other things, that petitioners paid them less than their male counterparts, in violation of the Equal Pay Act of 1963, 29 U.S.C. 206(d). Pet. App. 48a.[1] Petitioners moved to dismiss the Equal Pay Act claim on the ground of Eleventh Amendment immunity. *Id.* at 29a-30a, 52a. The district court denied the motion, holding that the Equal Pay Act contained a clear abrogation of Eleventh Amendment immunity, and that the abrogation constituted a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. *Id.* at 53a-56a, 29a-32a.

2. Petitioners took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the Equal Pay Act. The court of appeals affirmed. Pet. App. 2a-26a.

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[1] Respondents also alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 48a- 49a. The district court denied petitioners' motion to dismiss the Title VII compensatory damages claims on Eleventh Amendment grounds. *Id.* at 32a-35a. The court of appeals affirmed. *Id.* at 23a-26a. Petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

Agreeing with every other court of appeals that has addressed the question, the court "ha[d] little difficulty holding that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity" in the Equal Pay Act, in light of "the plain statutory language, which authorizes 'employees' to sue 'public agencies' in federal court for violations of the Equal Pay Act." Pet. App. 8a. The court also concluded that the Equal Pay Act was a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment to abrogate the Eleventh Amendment. *Id.* at 10a-23a. The court found that Congress "had substantial justification to conclude that pervasive discrimination existed whereby women were paid less than men for equal work." *Id.* at 21a. Furthermore, the court explained, the Equal Pay Act's burden-shifting scheme—in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then defendants must show that the differential is based on any factor other than sex—was "reasonably tailored to remedy intentional gender-based wage discrimination." *Id.* at 22a.

## ARGUMENT

The court of appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals to address the question. Accordingly, further review is unwarranted.

1. In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to

abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

Petitioners contend (Pet. 8-17) that the court of appeals erred in holding that the Equal Pay Act contains a clear expression of congressional intent to abrogate the States' Eleventh Amendment immunity. That claim does not merit this Court's review for two reasons.

First, the courts of appeals have unanimously rejected petitioners' argument. See *Mills* v. *Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Close* v. *New York*, 125 F.3d 31, 36 (2d Cir. 1997); *Abril* v. *Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery* v. *Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998); *Timmer* v. *Michigan Dep't of Commerce*, 104 F.3d 833, 837-838 (6th Cir. 1997); *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998), petition for cert. on other grounds pending, No. 98-1235; *Hale* v. *Arizona*, 993 F.2d 1387, 1391-1392 (9th Cir.) (en banc), cert. denied, 510 U.S. 946 (1993); *Aaron* v. *Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997). There is thus no conflict in the circuits.

Second, the decision of the court of appeals is correct and consistent with this Court's decisions. The Equal Pay Act was an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and relies on the FLSA's definitional and enforcement provisions. Petitioners concede (Pet. 11-12) that Congress clearly expressed its intent to include States as employers covered by the Equal Pay Act's substantive requirements: the Act defines the term "[e]mployer" to "include[] a public agency," 29 U.S.C. 203(d), and, in turn, defines "[p]ublic agency" as "the government of a State or political subdivision thereof" and any agency of

a State, 29 U.S.C. 203(x). Congress further underscored its intent by defining "employee[s]" covered by the Equal Pay Act to include, with certain exceptions, "any individual employed by a State." 29 U.S.C. 203(e)(2)(C).

Petitioners argue (Pet. 11-12), however, that Congress did not clearly and explicitly provide that the substantive Equal Pay Act right could be enforced against the States in federal court. That argument is mistaken. The Equal Pay Act (as part of the FLSA) provides that an "employee," which includes state employees (29 U.S.C. 203(e)(2)(C)), may bring an action "against any employer (*including a public agency*) in *any Federal* or State court of competent jurisdiction," 29 U.S.C. 216(b) (emphasis added). Contrary to petitioners' contention (Pet. 11), this provision plainly speaks not only to whether, but also to where, an Equal Pay Act suit may be brought against a State.[2]

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[2] Petitioners suggest (Pet. 11-12 n.4) that, because it is "well settled" that state employees must pursue their FLSA claims in state court, it must also be true that Equal Pay Act claims can only proceed in state court, since they both rely upon the same enforcement provision. Assuming without accepting petitioners' characterization about where FLSA claims "must" be brought, the difference in the fora available for the two claims has nothing to do with the clarity of Congress's expressed intent. Rather, it is attributable to court rulings regarding the scope of congressional power to abrogate under Section 5 of the Fourteenth Amendment. Congress clearly expressed its intent to subject States to suit in federal court in a single provision that governs both wage and hour claims under the FLSA and discrimination claims under the Equal Pay Act. While the courts of appeals have uniformly held that Congress had the power to abrogate Eleventh Amendment immunity in the Equal Pay Act because that statute is valid Section 5 legislation (see point 2, *infra*), the courts have also held that Congress had no such power with respect to the other provisions

Petitioners' attempts to escape this straightforward language are unavailing. Petitioners' complaint (Pet. 9) that the Equal Pay Act "does not even mention the Eleventh Amendment, sovereign immunity or abrogation" is beside the point. This Court has made clear that Congress need not employ specific terminology to manifest its intent to abrogate. See *Seminole Tribe*, 517 U.S. at 55-57; *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13-14 (1989) (plurality opinion), overruled on other grounds, 517 U.S. 44 (1996); 491 U.S. at 29-30 (Scalia, J., concurring in part and dissenting in part). Instead, Congress need only make clear that it intends to authorize private persons to sue States in federal courts. See *Seminole Tribe*, 517 U.S. at 57; *Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (no "explicit reference to state sovereign immunity or the Eleventh Amendment" is necessary to abrogate).

Petitioners' contention (Pet. 9-11) that, in confining suits to courts of "competent jurisdiction," Congress intended to require suits against States to proceed in state court, is equally misplaced. This Court has repeatedly rejected such a reading of analogous references to courts' general subject matter jurisdiction. Indeed, just last Term, this Court unanimously held that the phrase "original jurisdiction" in the federal removal statute, 28 U.S.C. 1441(a), embraced any case that falls within the federal courts' general subject matter jurisdiction, without regard to Eleventh Amendment constraints. *Wisconsin Dep't of Corrections* v. *Schacht*, 118 S. Ct. 2047, 2052-2053 (1998). The Court explained that the Eleventh Amendment does not

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of the FLSA, because they do not constitute an exercise of authority under Section 5 of the Fourteenth Amendment. See Pet. App. 10a n.5 (citing cases).

operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

*Id.* at 2052 (citations omitted); see also *id.* at 2055 (Kennedy, J., concurring); *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("The concept of a court of 'competent jurisdiction'" is "usually used to refer to subject-matter jurisdiction," and not to personal jurisdiction over particular defendants); *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1878) ("a tribunal competent by its constitution" refers to a court that is authorized "by the law of its creation * * * to pass upon the subject-matter of the suit," without regard to whether a particular defendant can be brought before the court), overruled on other grounds, 433 U.S. 186 (1977).[3]

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[3] Cf. *Howlett* v. *Rose*, 496 U.S. 356, 381 (1990) (state sovereign immunity principles will not be interpreted to prevent "a court of otherwise competent jurisdiction" from entertaining federal-law claims); *id.* at 382 (same with respect to "a court otherwise competent"); *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 56-57 (1912) (interpreting similar language in the Federal Employers' Liability Act, ch. 149, 35 Stat. 65: when a court's "ordinary jurisdiction * * * is appropriate to the occasion," principles of state sovereign immunity cannot be interposed to prevent enforcement of a federal right). Indeed, if the phrase "competent jurisdiction" bears the meaning petitioners ascribe, then Congress's abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act of 1990, 42 U.S.C. 12202,

Similarly, federal district courts are courts of "competent jurisdiction" for Equal Pay Act claims because they have jurisdiction over the subject matter; the Eleventh Amendment does not "automatically destroy * * * jurisdiction." *Schacht*, 118 S. Ct. at 2052. In addition, when Eleventh Amendment immunity is raised by a particular defendant, it does not bar jurisdiction; a federal court has jurisdiction over the suit because it is competent to hear claims when Congress has abrogated immunity. Thus, the statutory reference to courts of "competent jurisdiction" does not constitute an oblique reference to the Eleventh Amendment, but rather it excludes specialized federal and state courts (such as the Court of International Trade or state courts that adjudicate only criminal or family law cases) from being obliged to hear Equal Pay Act claims.[4]

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would be self-contradictory, because there Congress stated that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State *court of competent jurisdiction*" (emphasis added). This Court, however, will not construe statutory language in a manner that renders provisions nugatory. *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 163 (1982).

[4] Petitioners discuss at great length (Pet. 6-7, 12-15) the "incongruous result[s]" that they perceive the court's decision entails: namely, that FLSA suits could be brought against the United States in state court. That argument is a red herring. First, it has nothing to do with whether the court of appeals' decision merits this Court's review despite the complete harmony in circuit court rulings and consistency with this Court's precedents. Second, the determination of where the United States can be sued under the FLSA has nothing to do with the Eleventh Amendment questions petitioners present for review. Rather, it would be an issue of statutory construction regarding whether Congress intended the phrase "competent jurisdiction" to be construed in conjunction with the subject-matter limitations of other federal laws that Congress has enacted to channel monetary claims against the United

In addition to misunderstanding the law, petitioners' reading of "competent jurisdiction" collapses the two prongs of the *Seminole Tribe* inquiry, and thus simply begs the question, discussed in Part 2, *infra*, of whether Congress had the authority to abrogate Eleventh Amendment immunity. If it did, as we contend, then federal courts are "competent" to hear Equal Pay Act claims under even petitioners' reading of the statute.

Finally, petitioners contend (Pet. 15-16) that the court of appeals inappropriately relied on legislative history in holding that Congress intended to abrogate the States' Eleventh Amendment immunity. But this case does not present for review any question regarding the role of legislative history in discerning congressional intent to abrogate immunity. As petitioners concede in a footnote (Pet. 16 n.8), the court of appeals expressly stated that the "[legislative] history in itself has no bearing upon our inquiry into whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity. Rather, that intent must be made 'unmistakably clear in the language of the statute.'" Pet. App. 7a n.4 (quoting *Dellmuth*, 491 U.S. at 228). Furthermore, even had the court relied upon it, the court's recitation of the amendment history of Section 216(b)—as opposed to considering traditional legislative history documentation like House or Senate Reports and congressional debates—would not have been inconsistent with this Court's

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States into specified courts, see 28 U.S.C. 1346(a)(2), 1491(a), and to provide the United States Court of Appeals for the Federal Circuit exclusive jurisdiction to review such judgments, 28 U.S.C. 1292, 1295. No court has yet confronted that statutory construction question; nor is any court likely to, because the United States can simply remove any FLSA action filed in state court to the appropriate federal court. 28 U.S.C. 1442(a).

decisions. To the contrary, this Court has held that reviewing the purely textual evolution of a legislative provision is an appropriate means of determining legislative intent. See *Bailey* v. *United States*, 516 U.S. 137, 147 (1995) ("The amendment history of [a statutory provision] casts further light on Congress' intended meaning.").

2. Petitioners also contend (Pet. 17-29) that, even if congressional intent is clear, Congress lacked the legislative authority to effect the abrogation because the Equal Pay Act is not an "appropriate" exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim likewise does not merit this Court's review.

First, every court of appeals to address the question has ruled that the extension of the Equal Pay Act to the States was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Anderson* v. *State Univ.*, No. 98-7025, 1999 WL 92319, at *3-*4 (2d Cir. Feb. 24, 1999) (per curiam); *Ussery*, 150 F.3d at 437; *Timmer*, 104 F.3d at 838-839; *Usery* v. *Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery* v. *Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).[5]

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[5] We are aware of appeals involving the validity of the Equal Pay Act's abrogation pending in two other circuits. See *Larry* v. *Board of Trustees*, 975 F. Supp. 1447 (1997), aff'd on reconsideration, 996 F. Supp. 1366 (N.D. Ala. 1998), appeal pending, No. 98-6532 (11th Cir.) (argued Mar. 23, 1999); *O'Sullivan* v. *Minnesota*, No. 98-2706 (8th Cir.) (oral argument scheduled for May 13, 1999).

Petitioners point (Pet. 26-29) to "disarray" in the circuits regarding the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* This Court, however, has already granted certiorari to resolve that conflict in cases that (unlike petitioners') actually present that question. See *United States* v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel* v. *Florida Bd. of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). The utter lack of disarray or even substantive disagreement in the appellate decisions analyzing the Equal Pay Act thus stands in sharp contrast to the Section 5 issues presented by other legislation and counsels strongly against further review.

Second, contrary to petitioners' argument (Pet. 20-26), the court of appeals correctly concluded that the Equal Pay Act falls squarely within Congress's power under Section 5 of the Fourteenth Amendment. The Equal Pay Act prohibits employers from paying workers of one sex more than workers of the opposite sex for performing equal work. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). Once an employee has proven equal work and unequal pay, an employer bears the burden of persuasion (if it chooses to mount an affirmative defense) to show that the difference is not based on sex. See *id.* at 196-197. In essence, Congress has established a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination, but permits employers to rebut that presumption by showing that the actual cause of the disparity is a factor other than sex.

Petitioners argue (Pet. 21 n.10) that the Equal Pay Act falls beyond Congress's power under Section 5

because it permits the imposition of liability without the showing of intentional discrimination that the Equal Protection Clause requires, see, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229 (1976). In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), however, this Court reaffirmed that, when enacting remedial or preventive legislation under Section 5, Congress is not limited to prohibiting unconstitutional activity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518; see also *Lopez* v. *Monterey County*, 119 S. Ct. 693, 703 (1999) (same). Similarly, in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *City of Rome* v. *United States*, 446 U.S. 156 (1980), this Court upheld the constitutionality of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, even if no discriminatory intent is shown. *South Carolina* v. *Katzenbach*, 383 U.S. at 325-337; *City of Rome*, 446 U.S. at 177; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.) (upholding 1982 amendments to the Voting Rights Act that permitted challenges based on the discriminatory effects of voting practices, even though the Court had ruled that discriminatory effects alone do not violate the Fourteenth Amendment). Indeed, in *Flores*, the Court expressly reaffirmed that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause." 521 U.S. at 529 (citing *City of Rome*, *supra*, and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980)

(plurality opinion)). Congress's authority to prevent sex discrimination is equally broad.

Moreover, unlike the statute at issue in *Flores*, which comprehensively imposed a strict scrutiny standard on all state action even though there was little evidence of widespread constitutional violations, 521 U.S. at 530-533, the Equal Pay Act addresses the discrete problem of gender discrimination in salaries by establishing a remedial scheme that is carefully tailored to detecting and preventing those acts (unequal pay for equal work) most likely to be the result of such unlawful discrimination. Also unlike *Flores*, in which the Court found the "legislative record lack[ed] examples of modern instances" of intentional discrimination, *id.* at 530, Congress enacted the Equal Pay Act based on a record that employers were intentionally and systematically paying women less than men for equal work.[6]

Petitioners contend (Pet. 22-23) that there was no evidence that States in general (and Illinois in particular) engaged in intentional gender discrimination. But like their private counterparts, States had engaged in a long history of discrimination on the basis of sex. See *United States* v. *Virginia*, 518 U.S. 515, 531-534 (1996). Indeed, in extending Title VII to the States just two years before it extended the Equal Pay Act, Congress found evidence of sex discrimination by public em-

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[6] See S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963); H.R. Rep. No. 1714, 87th Cong., 2d Sess. 2 (1962); S. Rep. No. 2263, 81st Cong., 2d Sess. 2, 4 (1950); S. Rep. No. 1576, 79th Cong., 2d Sess. 2-3 (1946); *Corning Glass Works*, 417 U.S. at 195; see also *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974) (finding that "firmly entrenched practices" made "the job market * * * inhospitable to the woman seeking any but the lowest paid jobs").

ployers.[7] This "information and expertise that Congress acquires in the consideration and enactment of earlier legislation," *Fullilove*, 448 U.S. at 503 (opinion of Powell, J.), provides ample support for the tailored remedial scheme that Congress imposed. Nor is evidence of discrimination in the private sector "irrelevant" to the Fourteenth Amendment inquiry, as petitioners contend (Pet. 22). Congress was entitled to infer that discriminatory practices that pervade the private sector also occur in the public sector.[8] Furthermore, contrary to petitioners' suggestion (Pet. 23), this Court has long recognized that Congress need not find that individual States have engaged in discrimination before it may properly subject them to Section 5 legislation. See *Oregon* v. *Mitchell*, 400 U.S. 112, 133-134 (1970) (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.), 216-217 (opinion of Harlan, J.), 233-236 (opinion of Brennan, White & Marshall, JJ.), 283-284 (opinion of Stewart, J., joined by Blackmun, J., & Burger, C.J.) (nationwide ban on literacy tests upheld, despite geographically limited evidence of abuse); cf.

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[7] See S. Rep. No. 415, 92d Cong., 1st Sess. 7-8, 12 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4-5, 20 (1972); see also *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 523 n.13 (1982) (noting that "[m]uch of the testimony" at the hearings for Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination by educational programs receiving federal funds, "focused on discrimination against women in employment").

[8] Cf. *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 158 (1983) ("economic choices made by public corporations * * * are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders").

*Lopez*, 119 S. Ct. at 703-704 (state voting law subject to federal preclearance even though State as a whole is not a covered jurisdiction subject to preclearance under the Voting Rights Act, where the law will effect a voting change in and will be implemented in a covered county).

Lastly, petitioners contend (Pet. 23-26) that, in addition to determining that the substantive requirements of the statute can be upheld as valid Section 5 legislation, a court must make an additional judgment that abrogation of Eleventh Amendment immunity is "necessary" (Pet. 24) to enforce the substantive prohibition, which apparently would require some showing that "state courts are not a suitable forum" (Pet. 25). But in upholding the abrogation of Eleventh Amendment immunity for Title VII claims in *Fitzpatrick*, this Court did not undertake such an analysis. Instead, assuming that the substantive provisions were valid Section 5 legislation, 427 U.S. at 456 n.11, the Court simply held that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456. The microscopic review of Section 5 legislation that petitioners envision stands in sharp contrast to this Court's repeated statements that Section 5 authorizes "*Congress* in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" and that Congress's "conclusions are entitled to much deference." *Flores*, 521 U.S. at 536 (emphasis added) (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)); see also *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (legislation enacted pursuant to Congress's Section 5 authority is

valid if the court can "discern some legislative purpose or factual predicate that supports the exercise of that power" ); *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880).[9] In short, given Congress's superior fact-finding ability and the attendant "wide latitude" (*Flores*, 521 U.S. at 520) to which Congress is entitled in exercising its "comprehensive remedial power" under Section 5 of the Fourteenth Amendment,[10] the Equal Pay Act's scheme to detect and deter sex discrimination in wages is an appropriate exercise of Congress's Section 5 authority.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See also *City of Rome*, 446 U.S. at 175; *Strauder* v. *West Virginia*, 100 U.S. 303, 311 (1880); *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); cf. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

[10] *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 483).

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UNITED STATES OF AMERICA,
*Intervenor-Respondent,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY TO BRIEFS IN OPPOSITION

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Dated: April 20, 1999

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Petitioners Illinois State University, *et al.* ("Petitioners") submit the following reply to the briefs filed by Dr. Iris I. Varner, *et al.* ("Plaintiffs") and the Solicitor General of the United States ("Solicitor General") (collectively "Respondents") in connection with Petitioners' pending petition for a writ of certiorari.

## INTRODUCTION

The issue before this Court is whether claims made under the Equal Pay Act can be pursued in federal court, notwithstanding the Eleventh Amendment. This Court has oft repeated the admonition that "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States . . . ." *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Respondents, however, assert that the "fundamental constitutional balance" should in fact be undermined, notwithstanding the absence of any clear statutory language or congressional findings that a damage remedy in federal courts is necessary to protect the citizenry.

This Court should grant certiorari to resolve the disarray in the circuits on these issues and to prevent the tide of unconstitutional litigation against the States that has become commonplace in federal courts across the country. At the very least, this petition should be held pending this Court's resolution of the *Kimel* case. *See Kimel v. Florida Board of Regents*, 139 F.3d 1426, 1432-33 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999). Certiorari was granted in *Kimel* on January 25, 1999. *See id.* *Kimel*, which involves the Age Discrimination in Employment Act ("ADEA"), raises precisely the same question of congressional intent (involving identical statutory language) as does this petition. *Kimel* likewise raises the question of whether (and under what circumstances) Congress may legislate beyond the terms of the Fourteenth Amendment when it regulates the

employment practices of the States themselves, particularly when such legislation purports to abrogate Eleventh Amendment immunity. While the Equal Pay Act presents a clearer case of legislative alteration of a substantive constitutional rule than does the ADEA, this Court's resolution of the issues in *Kimel* will nevertheless have a material impact on the resolution of the issues raised in this petition.

## I. THE EQUAL PAY ACT DOES NOT INCLUDE THE UNEQUIVOCAL LANGUAGE NECESSARY TO ABROGATE ELEVENTH AMENDMENT IMMUNITY

Notwithstanding its halfhearted protestations, the Seventh Circuit plainly relied upon legislative history in reaching its conclusion that Congress intended to abrogate Eleventh Amendment immunity in passing the Equal Pay Act. *See* App. at 6a ("In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, it is helpful to consider the context and history of the statute."). This alone is sufficient reason to reverse the decision of the lower court.[1] *See, e.g., Dellmuth*, 491 U.S. at 228 (holding that abrogation analysis cannot be based upon anything other than the text of the statute itself).

Relying on a criminal case unrelated to the Eleventh Amendment, Respondents now argue that the lower court's reliance on legislative history is acceptable. *See* Gov. Opp. at 11 (citing *Bailey v. United States*, 516 U.S. 137, 147 (1995)). Such a claim could not be more mistaken. This Court has clearly and repeatedly held *that in the*

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[1] The fact that the Seventh Circuit found it necessary to resort to the Equal Pay Act's legislative history speaks volumes about the other circuit court decisions that have reached the same conclusion. *See* Gov. Opp. at 4-5 (citing circuit court decisions).

*Eleventh Amendment context*, only the text of the statute itself may be considered. *See Dellmuth*, 491 U.S. at 228.

The obvious reason that the Circuit Court (and now Respondents) must look to the Equal Pay Act's legislative history is that the language of the statute does not support abrogation. Respondents rely entirely on language in the statute allowing suit against "public agencies" (including both state and federal governments) in "any court of competent jurisdiction. *See* Gov. Opp. at 5-6. As described in Petitioners' opening brief, however, it necessarily follows from the Circuit Court's reasoning that Congress must also have intended to waive the federal government's immunity to suit in state court. *See* Pet. Cert. at 12-15. Rules of interpretation demand that identical language be applied identically, particularly since the standards for abrogation of immunity are the same for both the States and the federal government. *See id.* at 13-14.

Because there is no substantive response to this argument, Respondents merely sidestep it, claiming first that the issue has nothing to do with the Eleventh Amendment and then adding that even if the federal government were sued in state court, it could remove the case to federal court. *See* Gov. Opp. at 9-10 n.4. The question at hand, however, is one of congressional intent as demonstrated by the text of the statute. No one (least of all the Solicitor General) seriously believes that the language of the Equal Pay Act demonstrates congressional intent to abrogate the sovereign immunity of the United States. Given that, it is absurd to hold (as the lower court did) that the same language "unequivocally" demonstrates congressional intent to abrogate the Eleventh Amendment immunity of the States. The language is the same, the abrogation analysis is identical, and the justification for treating the United States differently than the States cannot be found in the

only place it is permissible to look - the language of the statute itself. *See* Pet. Cert. at 13-14. Therefore, contrary to Respondents' assertions, the question of whether the federal government can be sued in state court has everything to do with the Eleventh Amendment, because it speaks directly and forcefully to the intent of Congress to abrogate.

Respondents also claim that the circuit courts have uniformly held that the language of the Equal Pay Act demonstrates a clear intent to abrogate. *See* Gov. Opp. at 4-5. This is at best a half-truth. There is no dispute that both the Equal Pay Act and the ADEA derive their enforcement provisions (including its forum selection clause) from the Fair Labor Standards Act ("FLSA"). *See* App. at 6a-7a; *see Kimel*, 139 F.3d at 1432-33; *see also Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 USLW 3504 (U.S. Feb. 1, 1999) (No. 98-1235). The *Humenansky* court, as well as one of the opinions in *Kimel*, concluded that the FLSA enforcement provisions (the same provisions incorporated into the Equal Pay Act) do not contain the clear statement of intent to abrogate required by this Court. *See id.*[2] Therefore, Respondents' claim that there is no conflict on this issue is not correct.

In light of this conflict and the clear reliance on legislative history in the opinion of the Seventh Circuit, this Court should grant certiorari. The Eleventh Amendment immunity of a State cannot be and should not be based upon an analysis that directly conflicts with this Court's precedents.

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2 The *Humenansky* opinion relies in part on language that is not contained in the FLSA's provisions. *See Humenansky*, 152 F.3d at 824-25.

## II. THE SEVENTH CIRCUIT'S HOLDING THAT CONGRESS DID NOT EXCEED ITS REMEDIAL POWERS UNDER THE FOURTEENTH AMENDMENT CONFLICTS WITH THE DECISIONS OF THIS COURT

The *Boerne* decision laid to rest any notion that Congress is free, under the guise of the Fourteenth Amendment, to alter constitutional standards established by this Court. *See City of Boerne v. Flores*, -- U.S. --, 117 S. Ct. 2157, 2164-67 (1997). There can be no dispute that the Equal Pay Act does just that.

This Court has unequivocally held that there can be no finding of unconstitutional discrimination absent an affirmative showing of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 245-48 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979). As Respondents admit, the Equal Pay Act dramatically alters this standard by "establish[ing] a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination . . . ." *See* Gov. Opp. at 13. This, however, is exactly the "disparate impact" standard that this Court rejected in *Feeney*. *See Feeney*, 442 U.S. at 274.

Respondents claim that the Equal Pay Act represents acceptable "remedial or preventative legislation." *See* Gov. Opp. at 13-14. The Equal Pay Act, however, cannot be considered remedial or preventative if those words are to retain their common and natural meanings. In fact, there is a complete absence of any showing that the alteration of the standard is necessary to enforce the Constitution.

There is no evidence whatsoever that suits under the constitutional standard are ineffectual. *See* App. at 2a-26a. Nor has it been suggested that the States are systematically thwarting the efforts of women to seek equality under the proper, constitutional standard. *See id.*

And it has never been suggested that women fare more poorly in state court than in federal court. Even if such findings could support abrogation, Congress has never made them. *Compare South Carolina v. Katzenbach*, 383 U.S. 301 (1966).[3] Thus, under Respondents' reading, the Equal Pay Act would contravene this Court's holdings in *Katzenbach* and *Boerne*, since it would dispense with the need to show intentional discrimination without any showing of special needs or circumstances, thereby outlawing what amounts to constitutional state action. *See Boerne*, 117 S. Ct. at 2168.

Respondents now try to rely upon *Katzenbach* for the proposition that Congress has the power to prohibit and punish constitutional state action. *See* Gov. Opp. at 14. *Katzenbach*, however, was not a blank check. This Court could not have been more clear that its decision in *Katzenbach* was dictated by the exceptional conditions then existing in some of the States. *See Katzenbach*, 383 U.S. at 308-13, 333-35. As discussed above (*see* disc. *supra*

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[3] Respondents more or less admit that Congress did not consider whether there was specific evidence of constitutional violations by the States which would justify passage of the Equal Pay Act. *See* Gov. Opp. at 16-17. Respondents, however, claim that such a failure is supposedly not fatal, since Congress was entitled to rely on evidence of private discrimination, as well as institutional knowledge retained from work on previous legislation. *See id.* at 16-18. Such extrapolations, however, ignore the canons that weigh against abrogation of the Eleventh Amendment. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (describing "reluctance" to abrogate immunity). A finding of discrimination in private industry scarcely means that states discriminate or that their courts are inadequate. *Cf. Brzonkala v. Virginia Polytechnic Inst.*, Nos. 96-1814, 96-2316, 1991 WL 111891, at *69-70 (4th Cir. March 5, 1999) ("fourteenth amendment" legislation cannot survive judicial scrutiny absent specific evidence of unconstitutional behavior by the States themselves coupled with clear evidence that legislation is specifically adapted to address that behavior; broad assertions of discrimination are insufficient).

at 4-5), there has been no such showing (nor could there be) *vis-à-vis* the Equal Pay Act.

Just as fundamentally, *Katzenbach* addressed the question of Fourteenth Amendment authority in its own right (as did *Boerne*), and it did not consider the interplay between the Eleventh and Fourteenth Amendments. Neither *Katzenbach* nor *Boerne* suggest that abrogation of Eleventh Amendment immunity is appropriate in the absence of any need for a federal forum. *See Katzenbach*, at *passim*; *Boerne*, at *passim*.

Respondents nevertheless urge this Court to avoid such a "microscopic review," claiming that the need for a federal forum is irrelevant. *See* Gov. Opp. at 18. This argument, however, completely ignores the "essential" role that the Eleventh Amendment plays in our federalism. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Respondents are, therefore, simply mistaken in claiming that the analysis of whether legislation is "proportional and congruent" should take place without specific consideration of the interests protected by the Eleventh Amendment.[4] *See cf. Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 704 (4th Cir. 1999) ("[T]he broad-look review urged upon us by the government glosses over the crucial federalism concerns that animate the Eleventh Amendment.").

In urging this Court to decline review, Respondents only highlight the need for intervention. The Seventh Circuit and other courts simply have not heeded this Court's rulings in *Seminole Tribe* and *Boerne*. Unless this Court intervenes, several of the circuits will continue to

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[4] Respondents' claim that this Court did not consider the necessity of a federal forum when it decided *Fitzpatrick v. Blitzer*, 427 U.S. 445 (1976) is misguided. *See* Gov. Opp. at 18. In *Fitzpatrick*, as in a variety of cases involving race, the need for a federal forum has been long established. *See, e.g., Katzenbach*, at *passim*. Thus, the fact that the opinion in *Fitzpatrick* does not opine on this issue is not at all surprising.

treat the Equal Pay Act as proper "remedial" legislation under the Fourteenth Amendment, and thereby subject the States to unconstitutional damage actions in federal court. *See, e.g.*, Gov. Opp. at 13. Respondents lamely suggest that the Equal Pay Act is properly tailored to prevent "discrimination." *See, e.g., id.* at 15. But the definition of "discrimination" is exactly what is at issue. This Court established one definition in *Davis* and *Feeney*, but Congress established a different definition when it passed the Equal Pay Act. *See id.* at 13. That is the essence of the problem.

## III. IF PLENARY REVIEW IS NOT GRANTED AT THIS TIME, THIS COURT SHOULD HOLD THE PETITION PENDING ITS DECISION IN *KIMEL V. FLORIDA BOARD OF REGENTS*, NO. 98-791

Following the filing of ISU's petition for certiorari, this Court granted certiorari in the consolidated cases of *Kimel v. Florida Board of Regents*, No. 98-791 and *United States v. Florida Board of Regents*, No. 98-796. *See Kimel v. State Bd. of Regents*, 119 S. Ct. 901 (1999) and *United States v. Florida Bd. of Regents*, 119 S. Ct. 902 (1999). *Kimel* raises many of the same issues presented by this case. In *Kimel*, a divided panel of the Eleventh Circuit held that the States were immune from suit in federal court under the ADEA. *See Kimel*, at *passim*. Like the Equal Pay Act, the ADEA borrows its enforcement provisions from the FLSA. Judge Edmonson's opinion in *Kimel* found that this same language was insufficient to support a finding of abrogation, *see Kimel*, 139 F.3d at 1432-33, and the petition in *Kimel* presents this precise question. *See* Petition for Certiorari in *Kimel v. Florida Board of Regents*, No. 98-791, at (I). The resolution of that issue in *Kimel* is, therefore, likely to be dispositive with regard to the same language under the Equal Pay

Act. Accordingly, holding this case pending resolution of the issue in *Kimel* is the proper course.

*Kimel* also presents similar questions concerning congressional power to abrogate State immunity under its Fourteenth Amendment powers. *See Kimel*, 139 F.3d at 1436-40, 1446-48. Reflecting the general "disarray" described by the Seventh Circuit in its opinion in this case, the circuit judges in *Kimel* differed widely regarding what constitutes proper Fourteenth Amendment legislation. *See id.*; *see also* App. at 20a n.12. One circuit judge found that "though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts." *See Kimel*, 139 F.3d at 1437 (Hatchett, C.J., concurring in judgment in part, dissenting in part). Another circuit judge disagreed, finding that the ADEA was not valid enforcement legislation because it did not "hew the contours of Supreme Court defined Fourteenth Amendment rights" and was not a direct and proportional response to "documented pattern of constitutional violation." *See id.* at 1446 (Cox, J., concurring in part and dissenting in part).

The Equal Pay Act presents this conflict in any even more acute form. The Equal Pay Act does not require a finding of intentional discrimination, while the ADEA typically does. *Compare Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) *with Mullin v. Ratheon Co.*, 164 F.3d 696, 699-703 (1st Cir. 1999). As such, this case presents in some respects a more compelling case to invalidate Congress' purported abrogation of suits against the States. For this reason, it would be appropriate to consider both statutes next term. But even if this Court does not grant plenary review at this time, the Court's decision in *Kimel* will almost certainly have a material

bearing on the resolution of this case. Therefore, the instant petition should at least be held pending the outcome in *Kimel*.

## CONCLUSION

For the foregoing reasons and those set forth in Illinois State University's petition, a writ of certiorari should be granted or, in the alternative, this Court should hold this petition pending resolution of the *Kimel* cases.

Respectfully submitted,

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